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IN THE

Supreme Court of the United States

EDWARD MAXWELL LEWIS, MATTHEW S. LEWIS, MICHAEL LEWIS AND T.L. AND O.L. BY THEIR NEXT FRIEND, EDWARD MAXWELL LEWIS,
Petitioners,

v.

SANDRA STOLLE AND SHIRLEY M. BOHLE,
Respondents.

On Petition For Writ Of Certiorari
To The U.S. Circuit Court For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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133 pp

QUESTIONS PRESENTED

I. What is the legal standard by which a child's right to safety while in the custody of the state should be determined?

II. Is a child's constitutional right to safety while in the custody of the state violated when there is no requirement that the professional judgment standard be applied unless, as a threshold matter, the state's social workers know or suspect the likelihood of abuse or neglect?

PARTIES BELOW

The parties before this Court are petitioners Edward Maxwell Lewis, Matthew S. Lewis, Michael Lewis, and T.L. and O.L. by their next friend, Edward Maxwell Lewis, and respondents Sandra Stolle and Shirley M. Bohle.

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EDWARD MAXWELL LEWIS, MATTHEW S. LEWIS, MICHAEL LEWIS AND T.L. AND O.L. BY THEIR NEXT FRIEND, EDWARD MAXWELL LEWIS,

Petitioners,

v.

SANDRA STOLLE AND SHIRLEY M. BOHLE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Circuit Court of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is found at 308 F.3d 768 (7th Cir. 2002). The opinions and

orders of the district court (App.1) are not reported.

JURISDICTION

This Court has jurisdiction over the Seventh Circuit's judgments and orders pursuant to 28 U.S.C. § 1254(1). See generally, *Hohn v. United States*, 524 U.S. 236 (1998). Petitioners seek review of an opinion of the United States Court of Appeals for the Seventh Circuit entered on October 21, 2002, *see* App. 1.

STATUTORY PROVISIONS INVOLVED

U.S. CONST. Amend. XIV, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The plaintiffs-appellants-petitioners, five brothers, seek a writ of certiorari reviewing the decision of the United States Court of Appeals for the Seventh Circuit, affirming the decision of the United States District Court for the Western District of Wisconsin granting summary judgment for the defendants-appellees-respondents and dismissing the complaint.

Original jurisdiction in federal court exists under 42 U.S.C. § 1983. This case was commenced on January 26, 2001, when plaintiffs-appellants-petitioners Edward Maxwell Lewis (Max), Matthew S. Lewis (Matt), Michael G. Lewis (Mike), T.L. (Ted) and O.L. (Orin) (collectively, "the boys") filed a complaint against defendants-appellees-respondents under § 1983 for violation of the boys' right to safe placement while in state custody, to due process and to equal protection, as guaranteed by the Fifth and Fourteenth Amendments, and for state law violations. R.2. The claims arose from the acts and omissions of defendants-appellees Sandra Stolle and Shirley Bohle, social workers for the Wisconsin Department of Health and Social Services (collectively, "the social workers") relating to their 1990 and 1991 placement of the boys in the foster home of Derwin and Rebecca Lewis ("Derwin and Rebecca"), their failure adequately to supervise that placement and their recommendation that Derwin and Rebecca adopt the boys. The boys were physically abused beginning with their placement in the Lewis home and continuing through the time the social

workers recommended their adoption by Derwin and Rebecca. R.2. The boys were very young at that time, ranging from 5 to 10 years old. Appendix ("App.") 4, 5, 6, 7, 8, 10. R.41 at ¶¶ 1-5, 44, 46; R.47 at ¶ 1; R.49 at ¶ 1; R.48 at ¶ 1; R.50 at ¶ 1; R.51 at ¶ 1.

On April 9, 2001, the social workers moved to dismiss the boys' complaint. R.7. The motion was granted without prejudice on May 25, 2001. R.12. The boys filed an amended complaint on May 18, 2001, and a second amended complaint on May 29, 2001. R.11 and 17. Each side moved for summary judgment in June, 2001. R.28 and 39. On July 13, 2001, Ted and Orin moved for voluntary dismissal of their state claims without prejudice. R.70.

On July 31, 2001, the district court granted the social workers' summary judgment motion, making a factual determination that the social workers did not know or suspect that Derwin and Rebecca would abuse or neglect the boys. The court denied the boys' summary judgment motion and entered judgment dismissing the boys' 42 U.S.C. § 1983 claims with prejudice and costs and their state law claims without prejudice. R.80 and 81. The boys filed a notice of appeal with the Seventh Circuit Court of Appeals on August 28, 2001. R.89. The court of appeals affirmed the holding of the district court, finding that because the boys had not shown that the social workers had known that Derwin and Rebecca were probable child abusers, they had not violated any duty to the boys. Both the district court and the court of appeals considered the "know or suspect"

standard as a threshold standard and made factual determinations. Neither court discussed the application of the professional judgment standard to these facts.

REASONS FOR GRANTING THE PETITION

This Court has not yet ruled on the appropriate standard to be applied to the protection of children in the state's custody.

This Court has considered the rights of individuals in the state's custody in cases involving prisoners (*Estelle v. Gamble*, 429 U.S. 97 (1976), *Farmer v. Brennen*, 511 U.S. 825 (1994)) and institutionalized adults (*Youngberg v. Romeo*, 457 U.S. 307 (1982)) and has clarified the standard to be applied in each of these situations.

In *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), this Court held that the due process clause of the Fourteenth Amendment does not grant a child an affirmative right to safety or to governmental protection from *private* harm. The social workers in that case were not liable when a child's father beat the child, who was not a ward of the state, into a life threatening coma. The Court recognized, however, that "when the state takes a person into custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *Id.* at 199-200. This duty to protect "arises not from the State's knowledge of the

individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* This Court in *DeShaney* recognized the duty, but did not articulate a standard to apply to the protection of children in state custody. Here, the boys were foster children in state custody.

The circuits are split on which standard to apply. Some circuits have concluded that the applicable standard is the deliberate indifference standard under which this Court has decided the prisoner cases including *Estelle* and *Farmer*. *See Doe v. New York Department of Social Services,* 649 F.2d 134 (11th Cir. 1987); *Taylor through Walker v. Ledbetter,* 818 F.2d 791 (11th Cir. 1987). Other circuits have applied the professional judgment standard set forth in *Youngberg,* which addressed the protection of institutionalized persons. *See Yvonne L. v. New Mexico Dept. of Human Servs*, 959 F.2d 883 (10th Cir. 1992). The Seventh Circuit, in *K.H. Through Murphy v. Morgan,* 914 F.2d 846 (7th Cir. 1990), read together with the present case, has now developed its own standard, which is a hybrid of the deliberate indifference and the professional judgment standard. Under *K.H.*, as interpreted in the Seventh Circuit's decision in this case, the plaintiff must first show that the social worker knew or suspected that abuse or neglect were likely, which is, in effect, the deliberate indifference standard. If that showing is made, then the plaintiff must, show that the defendant's conduct violated the professional judgment standard of *Youngberg.*

The effect of this is that social workers need not exercise professional judgment to find out whether there is a likelihood of abuse or neglect of children. Indeed, they are protected from liability as long as they do not look hard enough to discover any danger to the children in their care.

Under *K.H.*, children, who are the most innocent and vulnerable persons in the state's custody, are treated more harshly, and have a greater burden to meet, than prisoners or institutionalized adults.

Petitioners urge this Court to clarify *DeShaney's* footnoted statement about the state's obligation to children in its custody and to give the courts below guidance on the standard which applies in such cases. The standard applicable to children in the state's care must be the professional judgment standard, not the harsher deliberate indifference standard, or even worse, as in *K.H.* as interpreted in this case, both. Without such clarification, children, like the petitioners here, will continue to suffer abuse, and those responsible for their safety, like the social workers here, will continue to be protected from liability as long as they don't look too closely when placing children in foster care.

I. CHILDREN'S NEED FOR PROTECTION IN FOSTER CARE CAN ONLY BE MET BY THE PROFESSIONAL JUDGMENT STANDARD.

This Court, in *Youngberg*, grappled with the standard to be applied in determining a violation

of a substantive right set forth in the Fourteenth Amendment Due Process Clause, when the persons at issue were not prisoners, as in previous cases, but were involuntarily committed patients. The Court had previously ruled that the standard to apply to a prisoner's claim for a violation of his Eighth Amendment rights to medical care was whether the prison official was deliberately indifferent to the serious medical needs of the prisoner. *Estelle,* 429 U.S. at 104-05. This Court, however, concluded that persons involuntarily committed to state custody are "entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." *Youngberg,* 457 U.S. at 321-22. Accordingly, the Court held that "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Youngberg,* 457 U.S. at 321-23. *Youngberg* contains no requirement that the person responsible for the patient's welfare must know or suspect the particular harm at issue.

This Court cited *Youngberg* when concluding, in *DeShaney,* that the Constitution imposes a duty to assume some responsibility for the safety of a person taken into custody and held there. Clearly, a child taken into foster care and held there is helpless. The child has been taken from his parents and cannot rely on their help. He has to rely on his foster parents and state social worker for protection. The child is not at

fault for coming into foster care, and the purpose of foster care is not to punish him. The child's situation is much more analogous to that of an involuntarily committed patient than to a prisoner. Clearly, the professional judgment standard must be applied.

In addition, the professional judgment standard should be applied from the beginning. Consistent with *Youngberg*, state workers must exercise professional judgment in their placement of children so that if there is a danger, the social workers may discover it.

II. *K.H.*, AS CONSTRUED BY THE SEVENTH CIRCUIT IN THE PRESENT CASE, IS INCONSISTENT WITH *YOUNGBERG* BECAUSE CHILDREN ARE REQUIRED TO PROVE *BOTH* DELIBERATE INDIFFERENCE AND FAILURE TO EXERCISE PROFESSIONAL JUDGMENT, IMPOSING ON CHILDREN A GREATER BURDEN THAN EITHER INVOLUNTARILY COMMITTED ADULTS OR PRISONERS.

Neither the district court nor the court of appeals in this case reached the question of the application of the professional judgment standard. Both courts made a factual determination that the social workers did not know or suspect that the boys were likely to be neglected or abused in the Lewis foster home. Relying on *K.H.*, neither court considered the obligation of the social workers to exercise professional judgment in the selection of the foster home, placement of the children in the home and the supervision of the placement once

the children were there. The only relevant question, according to both courts, was the social workers' actual knowledge or suspicion of abuse or neglect. Had the courts found that this knowledge or suspicion was present, the boys would, in addition, have been required to prove that the social workers had failed to meet the professional judgment standard.

Although *K.H.* and the decision below in this case recognize that the professional judgment standard in *Youngberg* is the correct standard, they misapply *Youngberg* and the professional judgment standard. Instead, these innocent children are being held to the deliberate indifference standard as a threshold standard before even reaching the professional judgment standard.

The "know or suspect" standard is another way of saying "deliberate indifference." This Court has defined deliberate indifference as "requiring a showing that the official was subjectively aware of the risk." *Farmer v. Brennan*, 511 U.S. 825, 829 (1994). Therefore, a prison official may be held liable "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847. Awareness of a *risk* of harm is analogous to a *suspicion* that harm will occur.

Youngberg requires more of the state actor than simply reacting when he or she is faced with a risk of injury. This Court concluded that the state must provide involuntarily held patients "reasonable care and safety, reasonably nonrestrictive confinement condition, and such

training as may be required by these interests." *Youngberg*, 457 U.S. at 324. Therefore, under *Youngberg*, the responsible official must act affirmatively to exercise professional judgment in protecting and providing for the institutionalized person from the beginning of the person's confinement. A foster child deserves no less.

Had the court of appeals properly applied *Youngberg*, the court would have found that the social workers were required to have exercised professional judgment from the beginning of the time they were responsible for the boys. Instead, the court required the boys to show that the social workers knew or suspected abuse, regardless whether the social workers had exercised the professional judgment that would have enabled them to discover such abuse. Such application of the deliberate indifference standard protects social workers at the expense of children. All the social workers had to do to be protected was not look, regardless of the effect on the children. The facts here support this unfortunate result.

From the very beginning, the social workers failed to exercise professional judgment. Initially, they failed to conduct a minimally adequate home study of the Lewises. The home study was the product of an apparently hurried investigation and did not meet the standard for social worker investigations; it was very general, used the words of the adoptive parents instead of those of the social worker, and did not appear to be the product of the social worker's analysis. App. 9. R.45 at ¶ 5(c); R.67 at ¶ 60. The social worker simply accepted the information provided

by the Lewises at face value. App. 9. R.45 at ¶ 5(c); R.67 at ¶ 60.

Likewise, the social workers failed to follow up on a negative reference they received about the family. App. 9. R.41 at ¶ 34; R.45 at ¶ 5(e). Had they followed up, they would have received important and alarming information. Compounding the problem, they seriously misrepresented the reference to the circuit court judge presiding over the boys' adoption by the Lewises. A Report of Investigation submitted to the circuit court judge in the adoption proceedings assured the court that "*[a]ll* references were extremely positive regarding Derwin and Rebecca and their parenting skills. The references highly recommended Derwin and Rebecca as adoptive parents and feel that they are doing an excellent job with their children." App. 10 at 27-28. R.41 at ¶ 69; R.43 at ¶ 7 & Ex. E, Bate Stamp # 3097. (Emphasis added). Instead, the reference raised serious concerns about Derwin's and Rebecca's discipline, tempers and treatment of the children.

Third, the social workers ignored the advice of the therapist and psychologist who evaluated and counseled the boys prior to their placement in the Lewis home. Both professionals advised against the children being placed together and strongly urged that consideration be given to allowing the boys to stay in the foster homes in which they were thriving. App. 9 at 3. R.45 at ¶ 5(a).

Fourth, the social workers failed to consider the boys' special needs in making a placement decision. Instead, they placed them and their

sister together in a home in which there were already five children, three of whom were also recently adopted special needs children, without any plan for providing counseling for the boys. In fact, they terminated the boys' existing counseling relationships. App. 9 at 3-4. R.67 at ¶ 59; R.45 at ¶ 5(b). They also failed to develop a transition plan for the children, bringing them to the Lewis home with no preparation. App. 4, 5, 7, 9 at 6-7. R.41 at ¶¶ 47, 49; R.47 at ¶¶ 7-8; R.48 at ¶ 7; R.50 at ¶ 10.

Later, after the children had been placed in the home, the social workers failed to follow up on an incident in which Derwin admitted that he hit a developmentally disabled child in the home. App. 10 at 4-8. R.41 at ¶ 64; R.43 ¶ 3 & Ex. A, Tr. p.61-63.

Finally, once the children were placed in the Lewis home, the social workers essentially abandoned them. Derwin and Rebecca began abusing the children immediately. Stolle, who was responsible for supervising the placement and subsequently recommending the adoption, never spoke to the children outside the presence of the Lewises. App. 4, 5, 6, 7, 8. R.41 at ¶ 66; R.47 at ¶ 14; R.48 at ¶ 17; R.49 at ¶ 19; R.50 at ¶ 17; R.51 at ¶ 9. She accepted what Rebecca and Derwin had to say without any independent verification of their information. In essence, after allowing the Lewises to write their own home study, she allowed them to do their own supervision of the placement. The failure to exercise professional judgment from the time the state became responsible for the boys left these

defenseless children unprotected from the abuse which was inflicted upon them.

The ruling below protects social workers at the expense of children. As a practical matter, it encourages social workers not to look for indicators of possible abuse or neglect. If a worker is liable only if he or she knows or suspects the likelihood of abuse - but not if the worker takes steps to avoid such knowledge - there is no incentive for exercising the professional judgment which will reveal the facts. Innocent and vulnerable children deserve better.

III. THE SOCIAL WORKERS DO NOT HAVE THE DEFENSE OF QUALIFIED IMMUNITY AVAILABLE TO THEM.

Government officials performing discretionary acts are protected by qualified immunity "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson v. Creighton,* 483 U.S. 635, 638 (1987). The clearly established rights which the social workers are accused of violating are the boys' constitutional right to safety and the right not to deteriorate physically or psychologically while in state custody. These rights were found to be fundamental in 1982 in *Youngberg.* Likewise, the responsibility to exercise professional judgment in providing for persons in state custody was well established following the *Youngberg* decision in 1982.

A child's right to protection, safety and well-being while in state custody was also recognized by this Court in *DeShaney* in 1989. Therefore, by 1990, when these boys were placed with Derwin and Rebecca, their fundamental right to a safe home was well-established.

K.H. did not diminish this right. In *K.H.*, the specific right asserted by the plaintiff and dealt with by the court was the "right not to be placed with and shuffled among foster parents known to be incompetent and indeed dangerous...." *K.H.* 914 F.2d at 850. Thus, in K.H., the court began with the assumption that the defendants knew or suspected abuse or neglect. *K.H.* did not change the basic *Youngberg* requirement that the social workers exercise professional judgment. *K.H.*, 914 F.2d at 853-54. Giving the social workers in the present case immunity for their failure to do anything to protect these helpless children would be contrary to the law as it was established in 1990 and 1991 and do a great disservice to children.

CONCLUSION

Petitioners respectfully request that the United States Supreme Court grant this petition for writ of certiorari in order to protect their constitutional rights and the constitutional rights of all children to safety while in the state's custody.

Respectfully Submitted,

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January 15, 2003.

IN THE

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EDWARD MAXWELL LEWIS, MATTHEW S. LEWIS, MICHAEL LEWIS AND T.L. AND O.L. BY THEIR NEXT FRIEND, EDWARD MAXWELL LEWIS,
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In the
United States Court of Appeals
For the Seventh Circuit

No. 01-3318

EDWARD M. LEWIS, *et al.*,

Plaintiffs-Appellants,

v.

ELOISE ANDERSON, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 01 C 56—**John C. Shabaz**, *Judge.*

ARGUED APRIL 1, 2002—DECIDED OCTOBER 21, 2002

Before EASTERBROOK, DIANE P. WOOD, and EVANS, *Circuit Judges.*

DIANE P. WOOD, *Circuit Judge.* This suit is about a foster care placement, and later adoption, that failed, because the host family (and later parents) turned out to be abusive. The plaintiffs are five of six siblings who were placed with the family. They have sued several officials of the Wisconsin Department of Health and Social Services (DHSS) in their individual capacities under 42 U.S.C. § 1983, alleging that the defendants violated their Fifth and Fourteenth Amendment due process rights when they entrusted them to this family. On cross motions for summary judgment, the district court ruled for the defendants, holding that the plaintiffs could not show that the state

knew or suspected that the foster parents were probable child abusers, and that such a showing was necessary for liability. The court dismissed some supplemental state claims without prejudice. While we are sympathetic to the unfortunate history of these individuals, we agree with the district court that the defendants violated no legal duty to the plaintiffs, and we therefore affirm.

I

The plaintiffs, Edward Max Lewis, Matthew S. Lewis, Michael G. Lewis, T.L., and O.L., all siblings, were minors at the time of the relevant events. Defendant Eloise Anderson was the Administrator of the Division of Community Services at DHSS. Defendants Sandra Stolle and April Lancour were social workers for DHSS; they were supervised by defendant Shirley Bohle.

In 1987, Derwin and Rebecca Lewis were the heads of a family that included one biological child and one foster child. In 1988 the couple adopted three "special needs" children. Later, the Lewises were considering adopting more children, and so the state undertook a new study of their suitability, which was completed in 1989. In 1990, DHSS became the legal guardian of the five plaintiffs and their sister, and it began searching for adoptive placement for them. As the children were Native Americans, the Indian Child Welfare Act, 25 U.S.C. § 1901 *et seq.*, applied to them. A strong preference had been expressed for placement of all the children together—a situation regarded as less traumatic for adopted children.

During the investigation of the Lewis family, DHSS obtained reports from at least three outside sources vouching for the ability of the Lewises to adopt more children. All sources ultimately recommended the Lewises as suitable adoptive parents, even though one source expressed some reservations. Prior to the placement of the children with the Lewises, DHSS also learned that Derwin Lewis,

the father, had on one occasion hit one of his children. Derwin discussed the event with a social worker. This was the only instance of even arguable rough treatment that DHSS knew about before the events at issue here.

On May 31, 1990, the state terminated the parental rights of the children's biological parents and they became wards of the state. Shortly thereafter, in June and July 1990, they were placed in preadoptive foster care with the Lewises, largely because the Lewises were (like the children) Native Americans and they were willing to take all six children. This placement involved removing the children from other temporary foster homes where they were doing well. Furthermore, it left the Lewises with a family of two parents and 11 children ranging from ages 5 to 15; of the 11 children, nine had special needs, including emotional, physical, and behavioral problems. On April 23, 1991, the Lewises formally adopted all six siblings.

The second amended complaint focuses on the time period between the foster care placement (roughly mid-1990) and the formal adoption. The children allege that they were physically abused by the family. Later, after the adoption, these problems came to light and the children were removed from the Lewis household and placed with other foster families. The district court found that during the foster care period the defendants neither knew nor suspected that the children would be, or were being, abused by the Lewises.

II

As an initial matter, we must consider whether this suit is barred by the *Rooker-Feldman* doctrine. See generally *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983) and *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). While neither party addressed this point in the original briefs, the panel raised it at oral argu-

ment and requested supplemental memoranda on the issue. The *Rooker-Feldman* doctrine is jurisdictional in nature, and thus it may be raised at any time for the parties and by the court *sua sponte*, see *4901 Corp. v. Town of Cicero*, 220 F.3d 522, 527 (7th Cir. 2000). Because of the jurisdictional nature of the doctrine, we must assure ourselves that it does not bar the suit before we turn to the merits. *Id.* See also *Garry v. Geils*, 82 F.3d 1362, 1364 (7th Cir. 1996).

Rooker and *Feldman* establish the fact that lower federal courts do not have jurisdiction to conduct direct review of state court decisions. *Rooker*, 263 U.S. at 416; *Feldman*, 460 U.S. at 482. Furthermore, the *Rooker-Feldman* principle extends to claims that are "inextricably intertwined with the state-court judgment [such that] the federal claim succeeds only to the extent that the state court wrongly decided the issues before it." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J., concurring); *Edwards v. Illinois Bd. of Admissions to the Bar*, 261 F.3d 723, 729 (7th Cir. 2001). The pivotal question, then, is "whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment." *Rizzo v. Sheahan*, 266 F.3d 705, 713 (7th Cir. 2001) (quotation marks and citation omitted). To put it another way, the key inquiry is "whether 'the district court is in essence being called upon to review the state-court decision.'" *Ritter v. Ross*, 992 F.2d 750, 754 (7th Cir. 1993), quoting *Feldman*, 460 U.S. at 483-84 n.16.

The plaintiffs contend that the *Rooker-Feldman* doctrine does not bar their claim because they are not challenging the final placement decision, but rather the shortcomings of the defendants in their evaluation of the suitability of the Lewis family for both interim and permanent placement. Labeling a suit as a § 1983 action alleging due process violations, however, does not automatically remove the bar to suit in federal court. See *Remer v. Bur-*

lington Area Sch. Dist., 205 F.3d 990, 997 (7th Cir. 2000) ("A plaintiff may not circumvent the effect of the *Rooker-Feldman* doctrine simply by casting [his] complaint in the form of a federal civil rights action.") (quotation marks and citation omitted).

To the extent that the plaintiffs in this case contend that their constitutional rights were violated by the defendants during the pre-adoption period, they may proceed; to the extent that they challenge the decision to approve the Lewises as adoptive parents, they may not (as the latter decision was taken under the supervision of the state courts). The decision with respect to the pre-adoption period, however, was not taken pursuant to any court order, and thus the § 1983 suit cannot be the equivalent of an attempt to have a lower federal court review a state court judgment. As to that period, there is no state court judgment to review; there is only the course of action followed by the DHSS officials. No Wisconsin court has ever entertained a case touching upon the process whereby the state actors chose the Lewises as foster parents and monitored their performance in that capacity prior to the adoption. We conclude that DHSS's allegedly negligent placement of the children with the Lewises, as opposed to any other foster family, is not "inextricably intertwined" with the decision that the children ought to be placed with a family in the first place, and thus that there is no *Rooker-Feldman* bar to this action.

III

This clears the way for us to proceed to the issues presented for review on this appeal. We review the district court's decision to grant summary judgment *de novo*, viewing all facts and drawing all inferences in favor of the non-moving party. *Weinberger v. State of Wisconsin*, 105 F.3d 1182, 1186 (7th Cir. 1997).

Although the underlying facts of this case portray a sad course of events, it is important to bear in mind that "the claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as [the Supreme Court has] said many times, does not transform every tort committed by a state actor into a constitutional violation." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 202 (1988). *DeShaney* held that a state has no constitutional duty to protect a child against parental abuse. *Id.* Nevertheless, it also recognized an exception—on which the plaintiffs here rely—for cases where the danger to the child is "state-created." See *Dykema v. Skoumal*, 261 F.3d 701, 704-05 (7th Cir. 2001), citing *DeShaney*, 409 U.S. at 201. Despite the fact that a state has no positive duty under the federal Constitution to provide for the safety of its citizens, *DeShaney*, 489 U.S. at 195, the Due Process clause of the Fourteenth Amendment imposes such a duty where state action "creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger than they otherwise would have been." *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993). Alternatively, the state's duty may arise from the creation of a "special relationship" between the state and the individual. See, *e.g.*, *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000) (*en banc*).

This court has held, in the context of child placement by an adoption agency, that agency officials and case workers are liable only if they violated "the right of a child in state custody not to be handed over by state officers to a foster parent or other custodian, private or public, *whom the state knows or suspects to be a child abuser.* Only in this case thus narrowly described can the foster parents be fairly considered an instrument of the state for child abuse." *K.H. v. Morgan*, 914 F.2d 846, 852 (7th Cir. 1990) (emphasis in original). Negligence or even gross negligence does not suffice to give rise to liability under § 1983. *Id.* at 852, citing *Daniels v. Williams*, 474 U.S. 327, 328 (1986) and *Archie v. City of Racine*, 847 F.2d 1211, 1220 (7th Cir. 1988) (*en banc*).

The standard articulated in *K.H.* does not take the next step and impose some kind of duty of inquiry in these cases. If we are to follow *K.H.*, therefore, the DHSS officials cannot be held liable on the basis of facts they did not actually know or suspect, even if they might have learned about disqualifying information if they had conducted a more thorough inquiry. In order to survive summary judgment, the plaintiffs needed to put forth a case that the DHSS defendants actually knew of or suspected the existence of child abuse in the prospective adoptive family.

The plaintiffs have attempted to meet this stringent standard by arguing that there is at least a dispute of fact on the question whether the defendants knew or suspected that the children were likely to be abused or neglected in the Lewis home. They also assert that there is a dispute of fact on the question whether the defendants failed to exercise professional judgment. As a last resort, they also urge us to revisit the standard set forth in *K.H.*

Operating under the "knowledge or suspicion" standard, we of course review the facts in the light most favorable to the plaintiffs. The relevant time frame for our inquiry is between the time when the state became the guardian of the children and when it relinquished guardianship to the adopting family—that is, between May 31, 1990 and April 23, 1991—when the children were formally adopted. Once a child is placed with a foster family prior to adoption, the state's duty continues through the period of foster care, as the state at that point is still legally the children's guardian. See, *e.g.*, *Terry B. v. Gilkey*, 229 F.3d 680, 682 (8th Cir. 2000).

The main evidence that the plaintiffs put forth to satisfy the knowledge or suspicion requirement comes from two sources: first, the incident mentioned earlier when Derwin slapped a different child, and second, the contents of a reference letter from friends of the family, the Nelsons.

Stolle, one of the defendants, knew about the slapping incident: Derwin admitted that he once lost his temper and hit Daniel, one of the children that the Lewises had already adopted at the time the plaintiffs were being considered for foster placement. Even though evidence of even a single instance of abuse may constitute a circumstance sufficient to warrant immediate state action on a child's behalf, see, *e.g.*, *Hatch v. Dep't for Children, Youth & Their Families*, 274 F.3d 12, 22 (1st Cir. 2001), that must be an instance of actual abuse. A single hitting of a child (without more evidence of the severity of the consequences than we have here) does not necessarily constitute child abuse; were that the case, nearly any practitioner or case worker who has ever witnessed a slapping of a child would be under a legal duty to report the occurrence to the designated agency—and every parent who ever slapped or spanked a child would face the possibility of losing custody of the child. See, *e.g.*, Wis. Stat. § 48.981(2) (making reporting of possible child abuse mandatory for designated persons). Many states have adopted a "not every bruise is an abuse" rule. See, *e.g.*, *Briggs v. State*, 752 N.E.2d 1206 (Ill. App. Ct. 2001) ("Beyond the regulation which states not every bruise amounts to abuse, the [Abused and Neglected Child Reporting Act] requires for a finding of abuse death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function, substantial risk of such injury, or corporal punishment which is excessive.") (quotations omitted). While one instance of child-hitting may raise a red flag, it does not immediately become a "suspicion" of child abuse.

Even if one known instance of slapping was not enough to raise a suspicion of an abusive environment for the DHSS officials, the plaintiffs also argue that this information did not stand alone. There was also a lukewarm reference letter in the file. Taken together, they argue, these two items should have done the job, in the sense that they would permit a trier of fact to find the neces-

sary knowledge or suspicion on the part of the defendants. We disagree. DHSS requires three letters of reference from non-relatives detailing the family's fitness for placements. Two of the references, given by the Curtises and the Genges, were unconditional in their endorsement of the Lewises. While the third reference, submitted by the Nelsons, was not unqualified, neither was it a negative report. To the contrary, the Nelsons concluded in their report that they believed the Lewis family was fit to adopt the children. They merely expressed a few concerns, such as their perceptions that the parents had short tempers and that the home might be too small for such a large number of children. The report also pointed to some "irritability" on the part of the mother related to her job and the fact that the parents "seem to have a little prejudice in some of the children." The Nelsons further wrote that "the [existing] children are still adjusting to find their place and we don't feel that their family is stable enough for more children yet."

Assuming that the DHSS officials credited every word of the Nelsons' report, this is still not enough to charge them with either knowledge or suspicion of child abuse. The Nelsons were asked to comment on "irritability, excessive drinking, use of narcotics, history of mental illness, [and] criminality." They mentioned only irritability in their response and qualified their comment with the statements about Rebecca's work demands. "Strict discipline," another factor the Nelsons included, is hardly direct evidence of likely child abuse. The plaintiffs claim that this should have alerted DHSS and its workers to the possibility of abuse. "Should have alerted," possibly (though we note that many people today bemoan the converse, loose discipline), but it is not sufficient to support a finding of knowledge or suspicion of abuse. In fact, no references to abuse or its possibility appear in the Nelson report. In response to the question "If you were responsible for a child's future, would you consider this individual/couple a good choice as a parent(s)?" the Nelsons

said "yes." While it might have been a good idea for the DHSS officials to have looked further into the Nelsons' potentially euphemistic references to strictness, discipline, and irritability, this is not the standard for § 1983 liability in the placement context under *K.H.*

Aside from the Nelson reference, the plaintiffs point to a statement by Rebecca, the mother, that she was "not too patient, moody." Rebecca further admitted that she came from a dysfunctional family and never really knew her father. The plaintiffs also rely on statements by therapists and psychologists that these six children should not be placed together because any foster parent would be quickly overwhelmed by the challenges they presented.

Even taken together and in the light most favorable to the plaintiffs, this evidence is insufficient to support a finding of knowledge or suspicion of impending child abuse on the part of any of the DHSS defendants. The question is not whether abuse was actually occurring or how bad it was; it is instead what degree of responsibility the law imposes on these state actors, and whether a lawsuit against them is a remedy for any abuse that was occurring. Much worse abuse of children has unfortunately taken place, but other courts have agreed with us that something like the *K.H.* standard governs whether any remedy lies against the state social workers. The Eighth Circuit had occasion to visit this issue *en banc* in *S.S. v. McMullen*, 225 F.3d 960 (8th Cir. 2000). In *S.S.*, the Eighth Circuit affirmed the dismissal of a § 1983 suit against several state actors for their placement of a child who was in state custody with her father. The father was known to associate with a convicted child molester who later sodomized the infant girl on at least two occasions. 225 F.3d at 962. The state actors were also in possession of a psychological evaluation of the father that described him as likely to endanger her welfare. The court concluded that even this degree of knowledge was insufficient to impose liability on the state actors. *Id.* at 963.

Thus, while the DHSS social workers may have been negligent in their background investigation of the prospective adoptive family, negligence is not enough to give rise to § 1983 liability. See *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998). They were never alerted by anyone or anything to either actual abuse or the possibility that the Lewises would abuse these children while they were under the state's guardianship. If state actors are to be held liable for the abuse perpetrated by a screened foster parent, under *K.H.* the plaintiffs must present evidence that the state officials knew or suspected that abuse was occurring or likely. 914 F.2d at 852.

Lastly, we decline the plaintiffs' invitation to reconsider the standard set forth in *K.H.* That standard does not conflict with any decision of the Supreme Court or more recent decision from this court. See, *e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 104-06 (1976) (setting forth the "deliberate indifference" standard); *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (deliberate indifference requires knowing disregard of risk to safety); *Jones v. Simek*, 193 F.3d 485, 490 (7th Cir. 1999) ("*Farmer* reaffirms the *Gamble* standard and stresses that the test for deliberate indifference is a subjective one: the prison official must act or fail to act 'despite his knowledge of a substantial risk of serious harm.'"). See also *White by White v. Chambliss*, 112 F.3d 731, 737 (4th Cir. 1997) (adopting *K.H.* standard); *Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 893 (10th Cir. 1992) (same). It is consistent with the approach taken by the Eighth Circuit, and it reflects the fact that liability should not be imposed lightly on state workers. (We note as well that even if we were inclined to reconsider *K.H.*, it would be virtually impossible to impose § 1983 liability on these particular defendants, because they would have an iron-clad defense of qualified immunity.)

IV

We likewise find it unnecessary to reach any of the other contentions on this appeal, including in particular the argument that the caseworkers gave undue weight to the Lewises as prospective foster parents because of the Indian Child Welfare Act. In light of our decision to adhere to the *K.H.* standard, the question whether the caseworkers would have found a better family had they looked beyond the field of prospective Native American parents is not relevant. We AFFIRM the judgment of the district court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APP. 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EDWARD MAX LEWIS,
MATTHEW S. LEWIS, M.L.,
T.L. AND O.L.,

Plaintiffs,

v.

ELOISE S. ANDERSON,
SHIRLEY M. BOHLE,
SANDRA STOLLE, and
JANE DOE

Defendants.

MEMORANDUM
AND ORDER
01-C-056-S

Plaintiffs Edward Max Lewis, Matthew S. Lewis, M.L., T.L. and O.L., by their next friend, Edward Max Lewis, filed a second amended complaint on May 30, 2001 against defendants Eloise S. Anderson ("Anderson"), Shirley M. Bohle ("Bohle") Sandra Stolle ("Stolle"), April Lancour ("Lancour") and Jane Doe ("Doe") in

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their individual capacities, seeking compensatory and punitive damages under 42 U.S.C. § 1983 and state law. Plaintiffs allege that defendants violated their Fifth and Fourteenth Amendment substantive due process rights and various state laws and regulations when defendants placed them in foster care. Plaintiffs T.L. and O.L. have been voluntarily dismissed without prejudice.

On June 15, 2001 plaintiffs filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. Defendants cross moved for summary judgment. These motions have been fully briefed and are ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the

mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Defendants move to strike the affidavits of Dr. Thomas Daniels, Mary Ann King, Kathy Mitchell and Gina Koeppl because they do not address the relevant issues before the Court. These affidavits will not be stricken because they may contain some relevant information.

Plaintiffs move to strike paragraphs 12, 13, 19, 24 and 35 of Lancour's affidavit as hearsay. These paragraphs include statements made by others to Lancour concerning the placement of plaintiffs and will be stricken as hearsay. Plaintiffs also move to strike paragraphs 17, 25, 27, 34 and 38 of Stolle's affidavit because they contain statements made to her by others. These paragraphs will also be stricken as hearsay.

FACTS

For purposes of deciding the motions for summary judgment the Court finds that there is no genuine dispute as to any of the material facts.

Plaintiffs Edward Maxwell Lewis (Max), Matthew S. Lewis (Matt) and Michael G. Lewis (Mike) (f/k/a M.L.) are adult residents of Wisconsin.

Defendant Eloise Anderson resides in Sacramento, California. Defendants Shirley Bohle and April Lancour reside in Rhinelander, Wisconsin. Defendant Sandra Stolle resides in Washburn, Wisconsin.

At all times material to this action defendant Anderson was the Administrator of the Division of Community Services, Wisconsin Department of Health and Social Services (DHSS), Madison, Wisconsin. Defendants Lancour and Stolle were social workers for DHSS who were supervised by defendant Bohle.

In 1987 plaintiffs Max and Matt were placed together in the foster home of Karen Waggoner. Mike (M.L.) was placed in the home of Doug and Debbie Schalow.

In 1987 a home study was completed by defendant Stolle on Derwin and Rebecca Lewis. At that time the family consisted of Derwin, Rebecca, one biological child and one adopted child. In 1988 the Lewises adopted three special needs children.

On September 29, 1988 defendant Stolle completed a second home study on the Lewises because they were again considering adoption. On July 11, 1989 Stolle completed an update to the second home study.

On May 11, 1990 Stolle received a reference about the Lewis family from John and Carrie Nelson, friends of the Lewises who had known

them for about five years. This reference was as follows:

> We do notice some irritability since she had been elected to do her job. She wants to be home but her job uses a lot of her time. They also have a very strict discipline of the children. They do seem to have a little prejudice in some of the children.
>
> Their strengths are good morals and church activity. They try also to teach well in these areas. They try to employ a good home life. But the children are still adjusting to find their place and we don't feel that their family is stable enough for more children yet. They need more time to feel each other out. Their tempers and judgments are too quick we feel and may affect their home adversely to any new adoptions especially older children. Also, their home seems small for so many. These we feel are their weaknesses. This is our opinion and we are not trying to judge.

The Nelsons concluded that the Lewises would be a good choice as parents.

On May 31, 1990 DHSS received guardianship of the plaintiffs following the termination of their biological parents' rights. Lancour was responsible for performing the duties of the guardian and finding adoptive resources for the plaintiffs. Because the children were Native Americans, the Indian Child Welfare Act applied to their adoption unless a good cause exception existed for placement preferences.

Mike was placed in the Lewis home on June 4, 1990. Max and Matt were so placed on July 11, 1990. On July 31, 1990 the case was officially transferred to Stolle. In August 1990 Max asked Stolle if she would take him for ice cream so he could talk to her alone but she told him not this time.

Stolle investigated the Lewises for a history of criminal conduct. Derwin had two worthless check charges in 1985 but no convictions.

In the fall of 1990 Derwin informed Stolle of an incident in the home that was being investigated by David Bauer, a Sawyer County social worker who investigated abuse allegations. Stolle went immediately to the Lewis home to discuss the allegations. On November 6, 1990 David Bauer discussed with Stolle the allegation that Derwin Lewis had hit Daniel. On November 20, 1990 Bauer informed Stolle that the abuse allegation was unsubstantiated. He also advised her that there was no likelihood of the children being maltreated in the Lewis home.

On December 12, 1990 Bohle attended an administrative review for plaintiffs and their siblings. Also present were Stolle, Debbie Keller, a Sawyer County Department of Social Services social worker, and Derwin Lewis. This panel supported the adoption of the children by the Lewises.

On April 23, 1991 the Court finalized the adoption of the plaintiffs. Plaintiffs allege that they were subsequently abused by the Lewises. By 1997 none of the plaintiffs lived with the Lewises. The plaintiffs were returned to the guardianship of the state.

MEMORANDUM

Plaintiffs claim that the defendants violated their Fourteenth Amendment substantive due process rights by placing them in the Lewis foster home. Defendants move for summary judgment on this claim.

The Seventh Circuit Court of Appeals has described substantive due process concerning foster children as follows:

> The only right in question in this case is the right of a child in state custody not to be handed over by state officers to a foster parent or other custodian, private or public, *whom the state knows or suspects to be a child abuser.* Only in this case thus narrowly described can the foster parents be fairly considered

> an instrument of the state for child abuse.

K.H. v. Morgan, 914 F.2d 846, 852 (7th Cir. 1990) [emphasis in original].

Only where the state workers place children with foster parents who they knew or suspected to be child abusers can they be liable. The Court limited this right by saying that defendants cannot be liable for damages where resource constraints prohibit finding a safe placement. The officials responsible for the inadequacy of those resources might be held liable for damages. Id. at 853-854.

Further, child welfare workers and their supervisors are immune from liability when they exercise a bona fide professional judgment as to where to place children in their custody. Youngberg v. Romeo, 457 U.S. 307 (1982). See also Bailey v. Pacheo, 108 F. Supp.2d 1214, 1220 (D.N.M. 2000).

In K.H. v. Morgan the Court stated as follows at p. 854:

> Only if without justification based either on financial constraints or on considerations of professional judgment they place the child in hands they know to be dangerous or otherwise unfit do they expose themselves to liability in damages.

The threshold issue is whether defendants placed plaintiffs in the Lewis home knowing or suspecting that they were child abusers. This standard is not what defendants should have known or would have known had they done more investigating. Negligent and grossly negligent conduct by state officials is not actionable under § 1983. K.H., 914 F.2d at 852.

Plaintiffs argue that based on the information available to the defendants they knew or suspected that the Lewises were child abusers. It is undisputed that neither plaintiffs nor anyone else ever told any of the defendants that plaintiffs were being mistreated or that they suspected plaintiffs would be abused.

Plaintiffs rely heavily on the reference provided by the Nelsons, friends of the Lewises, to impute knowledge to the defendants. The reference listed some weaknesses in the Lewis family as follows:

> But the children are still adjusting to find their place and we don't feel that their family is stable enough for more children yet. They need more time to feel each other out. Their tempers and judgments are too quick we feel and may affect their home adversely to any new adoptions especially older children. Also, their home seems small for so many. These we feel are their weaknesses.

The Nelsons, however, recommended the Lewises as adoptive parents. This reference contains no information from which defendants could know or suspect that the Lewises would abuse children placed in their home. While the Nelsons' statement mentions quick tempers and strict discipline it does not describe or imply the presence of physical violence or mistreatment.

Plaintiffs argue that had the defendants contacted the Nelsons they would have given them information that they suspected abuse. The standard for liability, however, is not what defendants should have known or would have known had they investigated further. Based on the reference the Nelsons provided at the time defendants had no knowledge or suspicion that the Lewises would abuse plaintiffs.

After the plaintiffs were placed in the Lewis foster home Max attempted to speak to Stolle alone on one occasion by requesting her to take him for ice cream. Perhaps Stolle should have known that Max had a problem and proceeded thereon but this request alone does not confer to defendant Stolle knowledge or suspicion of child abuse by the Lewises.

The third event upon which plaintiffs rely to show defendants' knowledge or suspicion is the alleged abuse by Derwin Lewis of his adopted son Daniel in 1990. In the fall of 1990 Derwin informed Stolle of an incident in the home that was being investigated by David Bauer, social worker for Sawyer County. Stolle went immediately to the Lewis home to discuss the allegations. On November 20, 1990 Bauer

informed Stolle that the abuse allegation was unsubstantiated. He also advised her that their was no likelihood of the children being maltreated in the Lewis home. Based on the report Bauer provided to Stolle of the investigation concerning the alleged abuse, she did not have knowledge or suspicion that plaintiffs would be abused by the Lewises.

Only where defendants place children with foster parents who they know or suspect to be child abusers can they e liable for a violation of their Fourteenth substantive rights. The undisputed facts indicate defendants did not know or suspect that the plaintiffs would be abused by the Lewises. Accordingly, they cannot be held liable for any violation of plaintiffs' substantive due process rights.

The Court need not reach the issue of whether defendants are immune from suit under Youngberg because of financial constraints or on considerations of professional judgment. Defendants are entitled to judgment in their favor as a matter of law.

Plaintiffs' remaining claims are state law claims. Defendants request that the Court dismiss these claims based on plaintiffs' failure to comply with the notice of claim statute. This issue, however, may be readily resolved by the state court.

This Court declines to exercise continuing supplemental jurisdiction over these claims pursuant to 28 U.S.C. § 1367(c)(3) and United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1986). See Brazinski v. Amoco

Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1983).

Lewis, et al. v. Anderson, et al., 01-C-56-S

ORDER

IT IS ORDERED that defendants' motion to strike the affidavits of Dr. Thomas Daniels, Mary Ann King, Kathy Mitchell and Gina Koeppl is DENIED.

IT IS FURTHER ORDERED that plaintiffs' motion to strike certain paragraphs of the Lancour and Stolle affidavits as described herein is GRANTED.

IT IS ORDERED that plaintiffs' motion for summary judgment is DENIED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of defendants against plaintiffs DISMISSING their federal law claims with prejudice and costs and their state law claims without prejudice.

Entered this 31st day of July, 2001.

BY THE COURT:

"s/John C. Shabaz"
District Judge

APP. 3

IN THE UNITED STATES DISCTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EDWARD MAX LEWIS, MATTHEW S. LEWIS, M.L., T.L., and O.L.,

Plaintiffs,

MEMORANDUM AND ORDER
01-C-056-S

ELOISE S. ANDERSON, SHIRLEY M. BOHLE, SANDRA STOLLE, and JANE DOE

Defendants.

Plaintiffs Edward Max Lewis, Matthew S. Lewis, M.L., T.L. and O.L., by their next friend, Edward Max Lewis, commenced this action on January 26, 2001 against defendants Eloise S. Anderson ("Anderson"), Shirley M. Bohle ("Bohle"), Sandra Stolle ("Stolle") and Jane Doe ("Doe") in their individual capacities, seeking compensatory and punitive damages under 42 U.S.C. § 1983. Plaintiffs allege that defendants

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violated their Fifth and Fourteenth Amendment substantive due process rights, their Fourteenth Amendment equal protection rights and various state laws and regulations when defendants placed them in foster care. Jurisdiction is premised on 28 U.S.C. § 1331. Defendants move to dismiss under Federal Rules of Civil Procedure 12 (b) (1) and 12 (b) (6).

FACTUAL ALLEGATIONS

Plaintiffs are Native American siblings ranging in age from 20 to 15 years. Plaintiffs Edward and Matthew Lewis are adults residing in Crandon, Wisconsin. Plaintiffs M.L. and T.L. are minors residing in Crandon, Wisconsin. Plaintiff O.L. is a minor residing in Bayfield, Wisconsin. Defendants Anderson, Bohle and Stolle were employed at all relevant times by the State of Wisconsin, Department of Health and Human Services, Division of Community Services ("the Department") in various capacities. Defendant Jane Doe is an unidentified social worker with the Department.

In 1983, plaintiffs were removed from the home of their biological parents due to neglect.[1] They remained in foster care until 1990.

At that time proceedings were undertaken for the adoption of plaintiffs by Derwin and Rebecca Lewis ("the Lewises"). The Lewises' had previously adopted other children in 1987. A

[1] The Court notes that plaintiffs were allegedly removed from their parents home in 1983 but that plaintiffs M.L., T.L. and O.L. were born in 1983, 1984 and 1985, respectively.

home study performed in conjunction with the 1987 adoption reported that Derwin and Rebecca Lewis, who already had one biological and one adopted child, had an annual gross family income of $17,000. Nevertheless, they were able to adopt three "special needs" children. In 1988, because the Lewises were interested in adopting again, a second home study was conducted which consisted of their self-report. This study was updated in 1989 because the Lewises became interested in adopting plaintiffs and their sister. Again, the Lewises family situation was self-reported. All studies were conducted by defendant Stolle and reviewed and approved by defendant Bohle.

Despite recommendations from a psychologist and therapist that plaintiffs should not be moved from their established foster homes defendants re-united plaintiffs and placed them in pre-adoptive foster care of the Lewises in July, 1990. Defendants preferred placement with the Lewises because Rebecca Lewis was Native American. Without any transition plan defendants uprooted plaintiffs from their foster homes and relocated them to the Lewis home in the span of one day.

Throughout the pre-adoptive placement the Lewises neglected and abused plaintiffs. In October, 1990 Dan Lewis, one of the Lewises previously adopted children, reported physical abuse by Derwin Lewis. However, when interviewed by a social worker (presumably defendant Doe) about the incident in front of the Lewises, Dan denied the allegation. During

plaintiffs' pre-adoptive placement the social worker visited three times and never interviewed plaintiffs outside the presence of the Lewises.

On April 9, 1991 the Lewises petitioned to adopt plaintiffs in Sawyer County Circuit Court. The circuit court approved and finalized the adoption on April 23, 2001 based on the Department's recommendation and home study reports authored and reviewed by defendants Stolle and Bohle.

After the adoption was finalized the Lewises continued their physical, sexual and emotional abuse and neglect. Eleven incidents of such abuse and neglect were reported to the authorities. Finally, on September 3, 1997 plaintiffs M.L., T.L. and O.L. were taken into protective custody by Sawyer County Social Services.

Plaintiffs claim that defendants violated their Fifth and Fourteenth Amendment substantive due process rights to be free from harm in foster care placement by failing: (1) to conduct a proper home study of the Lewises; (2) to develop and follow a transition plan; (3) to consider alternative placement options; (4) to supervise plaintiffs in the Lewis home and to investigate abuse allegations. Plaintiffs further claim that defendants violated their Fourteenth Amendment rights to equal protection by basing their placement decisions on plaintiffs' Native American heritage. Further, defendants failed to follow state regulations in placing plaintiffs with the Lewises.

APP. 3
MEMORANDUM

I. Subject Matter Jurisdiction

Defendants move to dismiss for lack of subject matter jurisdiction. Fed.R.Civ.P. 12 (b) (1). In determining whether subject matter jurisdiction exists the Court must accept as true all well-pleaded factual allegations and must draw all reasonable inferences in favor of plaintiffs. Remer v. Burlington Area School District, 205 F.3d 990, 996 (7th Cir. 2000). The Court may, however, look beyond jurisdictional allegations in making this determination. Id.

Defendants maintain that the *Rooker-Feldman* doctrine deprives this Court of jurisdiction. Under this doctrine, rooted in 28 U.S.C. § 1257, federal district courts do not have jurisdiction over claims seeking to review state court judgments. Levin v. Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois, 74 F.3d 763, 766 (7th Cir. 1996). The doctrine extends not only to claims raised in the state courts, but to the review of claims "inextricably intertwined" with state court determinations. Long v. Shorebank Dev. Corp., 182 F.3d 548, 554 (7th Cir. 1999). *Rooker-Feldman* requires federal plaintiffs to pursue such claims in state court. Id. The general question posed by *Rooker-Feldman* is whether "the injury alleged by the federal plaintiff resulted from the state court judgment or is distinct from that judgment." Id. (citation omitted).

In Remer the Seventh Circuit Court of Appeals noted that in cases applying the *Rooker-Feldman* doctrine the federal plaintiffs would have no complaint but for the state court determination. Remer, 208 F.3d at 998. In this case all actions taken by defendants and the Department appear "inextricably intertwined" with the Sawyer County Circuit Court's examination and approval of the Lewises' adoption petition. The defendants' investigations and reports which plaintiffs allege as the basis for their claims were required by court order and were examined by the circuit court. Wis. Stat. § 48.88 (2) (a); see also Defs. Reply Brief, Ex. K, at 7-8. Plaintiffs' pre-adoptive placement with the Lewises was a statutory prerequisite for the filing of the adoption petition. Wis. Stat. §§ 48.833, 48.90 (2). All the complained-of actions were taken in anticipation of, or were ordered pursuant to, the state court adoption proceedings.

Nevertheless, the *Rooker-Feldman* doctrine is inapplicable to plaintiffs' claims. In Long, although the Seventh Circuit noted that claims not raised in state court may still be barred under *Rooker-Feldman*, the Court stated that "an issue cannot be inextricably intertwined with a state court judgment if the plaintiff did not have a reasonable opportunity to raise the issue in state court proceedings." Long, 182 F.3d at 558 (citing Wood v. Orange County, 715 F.2d 1543, 1547 (11th Cir. 1983)). *Rooker-Feldman* is rejected where state court procedures form

barriers preventing plaintiffs from presenting their claims to the state courts. Id.

Such barriers existed for plaintiffs. The nature of the adoption proceedings before the state court precluded plaintiffs from asserting any claims or objections to the adoption. Plaintiffs were not present at the adoption hearing before the Sawyer County Circuit Court. See Defs. Reply Brief, Ex. K. They had no representation at the adoption hearing because under Wisconsin law a guardian ad *litem* is only appointed if the adoption investigation is unfavorable or discloses serious questions about the suitability of the adoption. Wis. Stat. § 48.88 (3). The person charged with representing plaintiffs' interests before the state court are the very defendants here alleged to have violated plaintiffs' rights with their woefully inadequate investigations. The appointment of a guardian ad *litem* thereby depends wholly on the defendants' investigations and findings. Virtually helpless, plaintiffs had no ability or opportunity to present the state court with their allegations of defendants' investigative shortcomings and the Lewises' pre-adoptive abuse and neglect.

The district court decision upon which defendants rely, T.W. v. Brophy, 954 F. Supp. 1306 (E.D. Wis. 1996) aff'd on other grounds, 124 F.3d 893 (7th Cir. 1997), is inapposite. In T.W., plaintiff as next friend brought a § 1983 action alleging that a racially-based foster placement had resulted in abuse. The district court dismissed, claiming that a § 1983 suit

would implicitly nullify the state court's placement decision. It had no occasion to discuss barriers precluding plaintiff from raising his claims in state court. Rather, the district court ruled that plaintiff's claims could have been pursued on appeal as plaintiff's first set of foster parents had appealed the state court's placement with the abusive foster parents, but had not raised plaintiff's claims. In this case plaintiffs had no such representative or available forum in which to pursue their claims and objections. For this reason *Rooker-Feldman* does not defeat jurisdiction.

II. Rule 12 (b) (6)

Defendants' motion under Federal Rule of Civil Procedure 12 (b) (6) is to dismiss for failure to state a claim upon which relief can be granted. Rule 12 (b) (6) motions challenge the legal theory of the complaint and allow courts "to eliminate actions that are fatally flawed in their legal premises and destined to fail and thus spare the litigants the burdens of unnecessary pretrial and trial activity." Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems, Inc., 988 F.2d 1157, 1160 (Fed. Cir. 1993). Plaintiffs need not plead particular legal theories or particular facts nor match facts to every element of a legal theory in order to state a claim. DeWalt v. Carter, 224 F.3d 607, 612 (7th Cir. 2000); Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998).

Rather, claims are dismissed where no relief could be granted under any set of facts consistent with the allegations in the complaint. Ledford v. Sullivan, 105 F.3d 354, 356 (7th Cir. 1997). Nevertheless, plaintiffs may effectively plead themselves out of a claim by alleging facts and legal theories that establish defendants' entitlement to prevail. Bennett, 153 F.3d at 519.

A. Substantive Due Process

Plaintiffs claim that defendants' failure to conduct a proper home study of the Lewises in 1990 violated their substantive due process rights to personal safety and security in foster care placement. (Compl. ¶¶ 40-41). They allege that defendants failed to exercise both ordinary care and the requisite professional care and judgment in assessing the Lewis home and addressing plaintiffs' needs. (Compl. ¶¶ 42-46).

Plaintiffs are generally correct in asserting that they have a clearly established a right to personal safety and security in foster care placement. See Kara B. Dane County, 555 N.W. 2d 630, 633-38 (Wis. 1996) (collecting and analyzing federal cases). Nevertheless, plaintiffs fail to recognize the limited scope of this right. The Seventh Circuit Court of Appeals has held that children in plaintiffs' position have only a "prima facie right not to be placed with a foster parent who the state's caseworkers and supervisors *know or suspect* is likely to abuse or

neglect the foster child." K.H. v. Morgan, 914 F.2d 846, 853 (7th Cir. 1990) (emphasis added).

This qualification - - that defendants must know of or suspect the likelihood of abuse by the foster parent - - is important in constitutional litigation. Defendants' level of culpability in inflicting harm must amount to more than mere negligence. "[L]iability for negligently inflicted harm is categorically beneath the threshold of constitutional due process." County of Sacramento v. Lewis, 523 U.S. 833, 849 (1998). Accordingly, negligent and grossly negligent conduct by state officials is not actionable under §1983. K.H., 914 F.2d at 852.

Plaintiffs argue that under Youngberg v. Romeo, 457 U.S. 307 (1982), the controlling test for liability is whether defendants exercised their professional judgment in their decisions regarding plaintiffs. Whether the Lewises' propensities were known to defendants, they argue, is irrelevant. This argument was rejected by the Seventh Circuit, however, in K.H. Plaintiffs echo the sentiments of the dissent, which argued that whether officers exercised "professional judgment" alone determines liability. K.H., 914 F.2d at 862 (Coffey, J. dissenting). The majority conditioned liability on both the known propensities of the foster parent and the exercise of professional judgment by state officials. Id. at 854 ("Only if without justification based whether on financial constraints or on considerations of professional judgment [child welfare workers and their supervisors] place the child in hands they know

to be dangerous or otherwise unfit do they expose themselves to liability in damages."). Plaintiffs' arguments failed to prevail at the Court of Appeals, and this Court is not the appropriate forum in which to revisit the issue.

Plaintiffs allege only that defendants failed to exercise the requisite degree of ordinary care. In doing so they have clearly pled a legal theory of negligence to the exclusion of all others theories of liability. Defendants' knowledge of the Lewises propensities for abuse and neglect is nowhere alleged nor can it be inferred in a manner consistent with the allegations of the complaint. Plaintiffs allege that defendants fail to take actions that would have informed them of the Lewises' propensities, not that they actually knew of their depraved propensities. Plaintiffs cannot pursue this negligence claim under the guise of § 1983.

B. *Equal Protection*

The equal protection clause of the Fourteenth Amendment guarantees that "all persons similarly situated should be treated alike." City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 439 (1985).

> [T]he "Equal Protection Clause has long been limited to instances of purposeful or invidious discrimination rather than erroneous or even arbitrary administration of state powers. The

> gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the state's action." Brisco v. Kusper, 435 F.2d 1046, 1052 (7th Cir. 1970). A plaintiff "must demonstrate intentional or purposeful discrimination" to show an equal protection violation. Bloomenthal v. Lavelle, 614 F.2d 1139, 1141 (7th Cir. 1980) (per curiam).

Shango v. Jurich, 681 F.2d 1091, 1104 (7th Cir. 1982).

Plaintiffs' complaint alleges that defendants intentionally discriminated against them on the basis of their Native American heritage when defendants placed them with the Lewises. As defendants affirm, by placing the Native American plaintiffs with the Native American Rebecca Lewis they were acting in accordance with the Indian Child Welfare Act ("ICWA"), 25 U.S.C. §§ 1901-1963 and Wis. Stat. § 48.028. The ICWA provides a list of placement preferences for Indian children. 25 U.S.C. § 1915 (a) & (b). Federal law provides for the distinct treatment of Native American children in foster care placements.

Plaintiffs do not contend that the ICWA does not apply to this case or that the statute itself violates equal protection. They argue only that their equal protection claim is based on

"defendants individual and improper application" of the ICWA. Pls.' Response Brief at 25. Specifically, they argue that defendants failed to pay heed to the ICWA's good cause exception to the stated preferences. Plaintiffs contend that defendants applied the ICWA in an irrational manner and that such application violated their equal protection rights.

There is no basis to hold that an erroneous application of a valid federal law denies equal protection. The issue is one of invidious classification and discrimination, not erroneous administration of law. Plaintiffs' complaint does not state a claim under the Equal Protection Clause of the Fourteenth Amendment.

C. *Other Grounds for Dismissal*

Defendants argue that the complaint fails to sufficiently identify the personal involvement of defendants Bohle and Anderson. They further maintain that the applicable statute of limitations has run on the claims of plaintiffs Max and Matthew Lewis. Having found that each of the plaintiff's claims is legally deficient the Court need not address defendants' more particularized grounds for dismissal.

Given the dismissal of plaintiffs' federal claims, the Court declines to exercise continuing supplemental jurisdiction of state law claims pursuant to 28 U.S.C. § 1367 (c) (3) and United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1986), and also dismisses them without prejudice.

APP. 3

ORDER

IT IS ORDERED that defendants' motion to dismiss plaintiffs' complaint without prejudice is GRANTED.

Entered this 24th day of May, 2001.

BY THE COURT:

"s/John C. Shabaz".
District Judge

App. 4

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EDWARD MAXWELL LEWIS,
MATTHEW S. LEWIS,
MICHAEL G. LEWIS,
T. L., *by his next friend, Edward Maxwell Lewis,*
and
O. L., *by his next friend, Edward Maxwell Lewis,*

Plaintiffs,Case No. 01 C 0056 S

v.

ELOISE S. ANDERSON,
SHIRLEY M. BOHLE,
SANDRA STOLLE,
APRIL LANCOUR, and
JANE DOE,

Defendants.

AFFIDAVIT OF EDWARD MAXWELL LEWIS

STATE OF WISCONSIN
COUNTY OF DANE

Edward Maxwell Lewis, being sworn on oath, states:

1. I am an adult, 21 years old; my birthdate is July 27, 1979. I currently reside in Crandon, Wisconsin.

2. I am a plaintiff in the case of *Lewis, et al. v. Anderson, et al.*, Case No. 01 C 0056 S, which is currently pending in the United States District Court for the Western District of Wisconsin.

3. In 1987, when I was approximately 7 years old, Forest County social services removed me from the home of my birth parents, Edward and Darlene Lipponen, and placed me and my brother, Matthew S. Lewis ("Matt"), in the foster home of Karen Waggoner ("Karen") in Crandon, Wisconsin.

4. During the time I lived with Karen, I went to school in Crandon, Wisconsin. I did really well in school and was involved in Boy Scouts and wrestling.

5. I was really happy when I was living with Karen and Matt. I saw my other brothers, Michael G. Lewis ("Mike"), Theodore J. Lewis ("Ted"), and Orin P. Lewis ("Orin") and my sister, Heather Lewis ("Heather"), as often as I wanted to, even though we did not live in the same home.

6. When I lived with Karen we participated in some of the Indian heritage events and practices. We went to pow-wows. We wore some of the Indian regalia, which Karen got for us. We danced at pow-wows. We participated in cleaning of wild rice and preparing native food like venison and snake.

7. Karen bought Matt and me horses and worked with us to teach us responsibility of caring for animals and the discipline that was involved with that care.

8. In July 1990, when I was 10 years old, my brother, Matt, and I were taken to the home of Derwin and Rebecca Lewis ("Lewises"). Some

ladies came and we had to pack up our clothes and get in their car with them. I did not want to leave Karen's home. I didn't know where the ladies were taking me. Matt was crying and screaming.

9. When I arrived at the Lewis home, my brother, Mike, and sister, Heather, were already there.

10. On the first day that I was living at the Lewis home, the social worker made me sing for the Lewises. I said that I didn't want to, but she persisted.

11. When I moved into the Lewis home, I did not receive any therapy or treatment. I had been seeing a therapist named Kathy while I lived with Karen. The last time I had seen Kathy, she told me that I was improving, but that I should continue in therapy.

12. The Lewises were very active in the Mormon Church. The Lewises always gave more than 10 percent of their income to the church as a tithe.

13. Before we were adopted, but after we were placed with the Lewises, Derwin Lewis told me that he didn't want to adopt us, but Becky convinced him that adopting us would be good for the Mormon Church.

14. Between July 1990 and our adoption, no social worker ever met with me, alone. I never observed a social worker meeting with any of the other children alone.

15. During that time (July 1990 to our adoption), Becky and Derwin physically abused me in a number of ways, including hitting me and kicking me. This abuse began immediately.

16.I wanted to tell someone how awful it was at the Lewis home. I tried to tell Karen Waggoner that I wanted to leave the Lewis home. I didn't like being hit and kicked and hurt. I also didn't like seeing the other kids being hurt. I wrote a letter to Karen from me and Matt. I thought we were only visiting the Lewis home, so I wrote that I didn't want to visit anymore and that I didn't like it there. We put the letter in the mailbox. The mail carrier brought it back to Becky because it lacked a stamp and address. She was furious. She made me and Matt eat the letter. I still remember the taste. It was written on orange or red construction paper.

17.Shortly after we were taken to the Lewis home, the social worker was visiting with Becky (and maybe Derwin). I wanted to talk to the social worker about what was going on in the home, but she did not talk to me on that visit. I waited outside so I could catch her on her way to her car. I waited next to the front walk, but she cut across the yard to get to her car. I started to call out to her, but she left.

18.When I lived in Forest County the county social workers would take us for ice cream when they wanted to talk with us alone. I wanted to talk to the social worker alone after I was placed at the Lewis home. In approximately August 1990, I asked the social worker if she would take me for ice cream. She said something like, not this time, maybe when I come back. She never came back when I was home.

19.I lived with the Lewises from July 1990 until

approximately early summer 1995. During those five years, I was abused by both Derwin and Rebecca Lewis many times. I was also abused by Leland Lewis many times. They hit me with open hands, fists and many different objects, and kicked me, among other things.

20.During the five years I lived with the Lewises I saw my brothers, Matt, Mike, Ted and Orin, and the other children in the house, each physically abused many, many times by both Derwin and Rebecca Lewis, as well as Lee.

21.After a while, I was scared to tell anyone outside the home about the abuse because I got beaten when I tried to tell and I saw some of my siblings get beaten for telling.

22.In 1995, I ran away from the Lewis home.

23.I started trying to get information about the county investigation into Derwin and Becky's abuse and the CHIPS cases when I was 17. The police told me had to request that information in writing. I did so, but did not receive any information in response to my requests.

24.I then asked county social services for that information. They refused to give me the information.

25.When I got a job at the Sokaogon Chippewa Community Of the Lake Superior Band of Indians Tribal Court, I found my file. That was in January 2000. The file was incomplete.

26.Then, I called a number of attorneys and children's rights organizations around the country trying to find someone who could explain to me the documents that I had found.

27.I first met with lawyers in February 2000.

28.I had no idea before that time what rights of mine had been violated or by whom.

Dated: June 12th, 2001.

"s/Edward Maxwell Lewis".

Subscribed and sworn to before me
this 12th day of June, 2001.
"s/Lynn J. Bodi".
Notary Public, State of Wisconsin
My commission: is permanent.

APP. 5

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EDWARD MAXWELL LEWIS,
MATTHEW S. LEWIS,
MICHAEL G. LEWIS,
T. L., *by his next friend, Edward Maxwell Lewis,*
and
O. L., *by his next friend, Edward Maxwell Lewis,*

Plaintiffs,Case No. 01 C 0056 S

v.

ELOISE S. ANDERSON,
SHIRLEY M. BOHLE,
SANDRA STOLLE,
APRIL LANCOUR, and
JANE DOE,

Defendants.

AFFIDAVIT OF MATTHEW S. LEWIS

STATE OF WISCONSIN
COUNTY OF DANE

Matthew S. Lewis, being sworn on oath, states:

1. I am an adult, 20 years old; my birth date is December 4, 1980. I currently reside in Crandon, Wisconsin.

2. I am a plaintiff in the case of *Lewis, et al. v. Anderson, et al.*, Case No. 01 C 0056 S, which is currently pending in the United States District Court for the Western District of Wisconsin.

3. In 1987, when I was approximately 6 years old, Forest County social services removed me from the home of my birth parents, Edward and Darlene Lipponen, and placed me and my brother, Edward Maxwell Lewis ("Max"), in the foster home of Karen Waggoner ("Karen") in Crandon, Wisconsin.

4. During the time I lived with Karen, I was in school. At that time, I attended school in Crandon, Wisconsin. I really liked school and was doing very well. I was involved in wrestling and Boy Scouts.

5. When I lived with Karen I participated in some Native American activities.

6. Karen's home was great. I really liked living with Karen and Max. I was happy. When I wanted to see my other brothers, Michael G. Lewis ("Mike"), Theodore J. Lewis ("Ted"), and Orin P. Lewis ("Orin") or my sister, Heather Lewis ("Heather"), either Max or I would tell Karen and she would set something up.

7. In July 1990, when I was 9 years old, Max and I were taken to the Lewis home by two ladies. I took some clothes with me. I was screaming and crying. I did not know where I was going or why Karen was crying. All I knew was that I was leaving my mom.

8. The first thing I remember about the Lewis home was watching Derwin kick

one of the kids in the butt for touching the church's keyboard which was in the living room on the left hand side against the wall. That happened the first day I was there.

9. On the first night, I sat in the bedroom at the Lewis home crying. I missed Karen so much.

10. During the first month that I lived at the Lewis home, I was very upset because I was missing Karen so much. One day during the first month, I was thinking about Karen and I started kicking at the wall. Derwin told me to stop. I did stop. I then sat on the bed and tapped my head against the wall. Derwin came into the bedroom, grabbed my hair and smashed my head against the wall.

11. Within the first six months that I lived at the Lewis home, Max and Leland Lewis ("Lee") got into a disagreement. Becky told Derwin to go and get the boxing gloves and let Max and Lee take care of it themselves. Derwin gave Max and Lee boxing gloves and sent them outside. Rebecca had a cast iron pan and a spoon and was hitting them together like a boxing bell. Lee beat Max up pretty badly. Max had a bloody nose and a fat lip. The fight did not end until Becky hit the pan again.

12. I lived with the Lewises from July 1990 until sometime in 1997. During those years, I was abused by both Derwin and Rebecca Lewis many times.

13. When I first moved into the Lewis home, I did not receive any therapy or treatment.

14. Some of the ways Rebecca Lewis physically abused me included punching me,

kicking me and hitting me with various objects.

15. Some of the ways Derwin Lewis physically abused me included hitting and kicking me.

16. During the seven years I lived with the Lewises I saw my brothers, Max, Mike, Ted, and Orin, each physically abused many times by both Derwin and Rebecca Lewis.

17. During the time I lived at the Lewis home, I never met with a social worker alone.

18. During the first six months I was at the Lewis home, I tried to tell Karen Waggoner about the abuse but Rebecca Lewis made me and Max eat the letter. After that, I never told anyone else about the abuse, until I told my teacher, Ms. Jonjak, in 1997.

19. In 1997, I finally ran away from the Lewis home because of a specific incident of abuse by Derwin and Rebecca. It was a Friday night and I was at a school dance at Hayward High School. I had borrowed a CD player from a friend at school. Lee stole the CD player from me and sold it. The mother of my friend called Rebecca. Rebecca then came to the dance and pulled me outside. She blamed me for the lost CD player. I told her what happened, but she did not like what I said. She took me to Derwin's work and she told him what happened. Derwin got upset. I was sitting in the back seat on the passenger side of the car. Derwin opened the car door, grabbed the door frame with both his hands, lifted himself up and kicked me with both of his feet. He was wearing his work boots. I tried to get out of the car. Rebecca leaned over the front seat, tried to hold me down and pulled my hair. Derwin told Eddy

(who was sitting next to me) to help hold me down, too. Eddy held me down and Derwin then hit me with a closed fist. On Saturday, I noticed that I got a bump on my head from Derwin hitting me and I decided, "If the bump on my head is still there Monday morning, I am not going home from school." At the end of the school day on Monday, I was in Ms. Hazel Jonjak's class and I told her what had happened and showed her the bump on my head. She told me that she would have to report it. That night, I was at the Hayward Police station. The police suggested I go home, and if I had to, run away again the next day. That is what I was going to do. Later I found out that I was going to a temporary foster home. I went to the Butler foster home that night and I never went back to live at the Lewis home.

20. At my brother Max's suggestion, I first met with lawyers in February 2000 to talk about the abuse I had suffered at the Lewis home.

21. I had no idea before that time what rights of mine had been violated or by whom.

Dated: June 12, 2001.

"s/Matthew S. Lewis".

Subscribed and sworn to before me
this 12th day of June, 2001.
"s/Debra A. Morris".
Notary Public, State of Wisconsin
My commission: 08/17/03.

APP. 6

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EDWARD MAXWELL LEWIS,
MATTHEW S. LEWIS,
MICHAEL G. LEWIS,
T. L., *by his next friend, Edward Maxwell Lewis,*
and
O. L., *by his next friend, Edward Maxwell Lewis,*

Plaintiffs,Case No. 01 C 0056 S

v.

ELOISE S. ANDERSON,
SHIRLEY M. BOHLE,
SANDRA STOLLE,
APRIL LANCOUR, and
JANE DOE,

Defendants.

AFFIDAVIT OF MICHAEL G. LEWIS

STATE OF WISCONSIN
COUNTY OF DANE

Michael G. Lewis, being sworn on oath, states:

1. I am an adult, 18 years old; my birth date is January 30, 1983. I currently reside in Crandon, Wisconsin.

2. I am a plaintiff in the case of *Lewis, et al. v. Anderson, et al.*, Case No. 01 C 0056 S, which is currently pending in the United States District Court for the Western District of Wisconsin.

3. In 1987, when I was approximately 4 years old, Forest County social services removed me from the home of my birth parents, Edward and Darlene Lipponen, and placed me and my sister, Heather, in the foster home of Doug and Debbie Schalow ("Schalows") in Wabeno, Wisconsin.

4. The Schalows had two other children in their home, Tim and Missy.

5. During the time I lived at the Schalow's home, I started school. At that time, I attended school in Wabeno, Wisconsin. I liked school.

6. When I lived with the Schalows I was exposed to Indian culture, and I specifically remember attending a pow-wow which was sponsored by the school.

7. The Schalows were very nice to me and I was happy when I was living with the Schalows.

8. In May 1990, when I was 7 years old, my sister, Heather, and I were taken to visit Rebecca and Derwin Lewis ("Lewises"). We stayed at the Lewis home for a few days.

9. During my visit to the Lewis home in May 1990, I forgot to put my clothes away and Rebecca Lewis hit me in the head with her hand and grounded me.

10. After the visit to the Lewises in May 1990, I returned to the Schalow's home.

11. In June 1990, Heather and I were taken to the Lewis's home. We never went back to the

Schalow's home and I never saw or talked to the Schalows again.

12. When I moved into the Lewis home, I did not receive any therapy or treatment and I never saw a therapist until I left the Lewis home for good.

13. On the first day that I was living at the Lewis home, I put a big rock on a metal grate which was in the backyard of the Lewis home half in a sand pile and near an old clothesline. Derwin Lewis ("Derwin") had told me not to play with the grate. Later, Derwin asked me if I had put the rock on the grate. I answered, "yes". Derwin immediately kicked me in the butt. He was wearing boots when he kicked me. I cried. There were other kids playing in the sand pile when Derwin kicked me. Those kids saw Derwin kick me.

14. I remember the day my name changed from "Lipponen" to "Lewis". I didn't like having to change my name. I told one of the Lewises that I didn't want to change my name.

15. I lived with the Lewises from June 1990 until September 1997. During those 7 years, I was abused by both Derwin and Rebecca Lewis many times.

16. Some of the ways Rebecca Lewis physically abused me included punching me; kicking me and hitting me with various objects.

17. Some of the ways Derwin Lewis physically abused me included hitting and kicking me.

18. During the 7 years I lived with the Lewises I saw my brothers, Edward Maxwell Lewis ("Max"), Matthew S. Lewis ("Matt"), Theodore J. Lewis

("Ted"), and Orin P. Lewis ("Orin"), each physically abused many times by both Derwin and Rebecca Lewis.

19. I never spoke to a social worker alone during the whole time I lived at the Lewis home.

20. In September 1997, when I was 14 years old, I ran away from the Lewis home with my brothers, Ted and Orin. I finally ran away because I couldn't take being hit anymore. I never went back to the Lewis home. I was put into foster care.

Dated this 12 day of June, 2001.

"s/Michael G. Lewis".

Subscribed and sworn to before me
This 12th day of June, 2001.
"s/Lori A. Witalison".
Notary Public, State of Wisconsin
My commission: 08/19/01.

APP. 7

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EDWARD MAXWELL LEWIS,
MATTHEW S. LEWIS,
MICHAEL G. LEWIS,
T. L., *by his next friend, Edward Maxwell Lewis,*
and
O. L., *by his next friend, Edward Maxwell Lewis,*

Plaintiffs,Case No. 01 C 0056 S

v.

ELOISE S. ANDERSON,
SHIRLEY M. BOHLE,
SANDRA STOLLE,
APRIL LANCOUR, and
JANE DOE,

Defendants.

AFFIDAVIT OF THEODORE J. LEWIS

STATE OF WISCONSIN
COUNTY OF DANE

Theodore J. Lewis, being sworn on oath, states:

1. I am 17 years old; my birth date is June 9, 1984. I currently reside in Winter, Wisconsin.

2. I am a plaintiff in the case of *Lewis, et al. v. Anderson, et al.*, Case No. 01 C 0056 S, which is currently pending in the United States District Court for the Western District of Wisconsin.

3. In 1987, when I was approximately three years old, Forest County social services removed me from the home of my birth parents, Edward and Darlene Lipponen, and placed me and my brother, Orin P. Lewis ("Orin"), in the foster home of Don and Debbie Kegley ("Kegleys") in Crandon, Wisconsin.

4. I liked it at the Kegleys. They were very nice, and I enjoyed having Orin, Nick, Darlene and Debbie as my brothers and sisters. I remember that we had fun there. We would go camping together.

5. I wanted to stay at the Kegleys, and I know they wanted me to stay there.

6. In July 1990, when I was six years old, Orin and I were taken to the Lewis home. I did not know that I would have to move. I was not aware of what was happening in court and that the parental rights of my birth parents were being terminated. I was told by my foster parents that I'd be moving on the day that I left their home to go to the Lewis home.

7. I don't remember meeting Derwin and Rebecca Lewis before the day I moved there. I did not see or hear from the Kegleys again until after I was taken away from the Lewis home when I was thirteen years old.

8. When I moved into the Lewis's home, I did not receive any therapy or

treatment, and I never received any therapy or treatment during the time I lived in the Lewis home.

9. My other siblings, Heather Lewis ("Heather"), Edward Maxwell Lewis ("Max"), Matthew S. Lewis ("Matt"), and Michael G. Lewis ("Mike"), also were living at the Lewis's home, with Orin and me.

10. The first thing I remember about the Lewis home happened a couple nights after I arrived there. I remember crying and telling Derwin and Rebecca that I wanted to go home. They put me outside and told me that I could walk back there. I was only six years old, and I didn't know what to do. I sat outside and cried. Finally, they came outside, took me inside and sent me to bed. I also remember Mike and Max getting beat up soon after we arrived at the Lewis home.

11. I can't remember the first time I was abused in the Lewis home; however, I remember that Derwin and Becky were frequently angry. At first, they would spank and yell at me. They would hit me until I started crying.

12. I lived with Derwin and Rebecca Lewis from July 1990 until September 1997. During those seven years, I was abused by both Derwin and Rebecca Lewis many times.

13.Some of the ways Rebecca Lewis physically abused me included punching me, kicking me and hitting me with various objects.

14. Some of the ways Derwin Lewis physically abused me included hitting and kicking me.

15. One day, after Rebecca had hit me

with a plastic spatula hard enough to leave bruises and welts, she sat on me and told me I couldn't go to school because I had said I would tell on her. She made me sit on the floor in the living room and I was crying for a very long time. She sat on the couch staring at me. I finally told her that I would not tell on her and she let me go to school. She drove me to school and dropped me off.

16. During the seven years I lived with Derwin and Rebecca Lewis, I saw my brothers, Max, Matt, Mike, and Orin each physically abused many times by both Derwin and Rebecca Lewis. The abuse of all of us continued to get worse as time went on. I was afraid to tell anyone outside the family because I believed that if I told anyone about the abuse, Rebecca would not let me go to school and I saw what had happened to my older adopted sister, Nikki, and my brother, Max, and my adopted brother, Dan when they tried to tell. I remember one occasion when Nikki talked to a counselor at school. The counselor called the police, and the police came out to the house. After the police left, Rebecca and Derwin beat up Nikki. I also remember Max telling someone and then watching him be beat up by Rebecca and Derwin.

17. No social worker ever met with me alone while I was living at the Lewis home.

18. I ran away from the Lewis home on many occasions. In September 1997, I finally ran away from the Lewis home with my brothers Mike and Orin. I told about the abuse, and I never saw Rebecca or Derwin again.

Dated this 12 day of June, 2001.

"s/Theodore J. Lewis".

Subscribed and sworn to before me
This 12th day of June, 2001.
"s/Lori A. Witalison".
Notary Public, State of Wisconsin
My commission: 08/19/01.

APP. 8

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EDWARD MAXWELL LEWIS,
MATTHEW S. LEWIS,
MICHAEL G. LEWIS,
T. L., *by his next friend, Edward Maxwell Lewis,*
and
O. L., *by his next friend, Edward Maxwell Lewis,*

Plaintiffs,Case No. 01 C 0056 S

v.

ELOISE S. ANDERSON,
SHIRLEY M. BOHLE,
SANDRA STOLLE,
APRIL LANCOUR, and
JANE DOE,

Defendants.

AFFIDAVIT OF ORIN P. LEWIS

STATE OF WISCONSIN
COUNTY OF DANE

Orin P. Lewis, being sworn on oath, states:

1. I am 15 years old; my birth date is July 1, 1985. I currently reside in Crandon, Wisconsin.

2. I am a plaintiff in the case of *Lewis, et al. v. Anderson, et al.*, Case No. 01 C 0056 S, which is

currently pending in the United States District Court for the Western District of Wisconsin.

3. In 1987, when I was approximately 2 years old, Forest County social services removed me from the home of my birth parents, Edward and Darlene Lipponen, and placed me and my brother, Theodore J. Lewis ("Ted"), in the foster home of Don and Debbie Kegley ("Kegleys") in Crandon, Wisconsin.

4. When I lived with the Kegleys, I was happy. It was a fun place to live. I really enjoyed living there and I was sad to leave.

5. In July 1990, Ted and I were taken to the Lewis home. I was 5 years old.

6. When I moved into the Lewis home, I did not receive any therapy or treatment. I only saw a counselor after I left the Lewis home in 1997.

7. The first thing I remember about the Lewis's home is Lee chased me through a trail in the woods and I tripped on a barbed wire trap and hit my eye on a stump. Lee had set the traps in the woods.

8. I lived with the Lewises from July 1990 until September 1997. During those 7 years, I was abused by both Derwin and Rebecca Lewis many times.

9. No social worker ever came and talked to me alone while I was living at the Lewis home.

10. Some of the ways Rebecca Lewis physically abused me included pinching me, kicking me, hitting me with various objects and pulling my hair.

11. Some of the ways Derwin Lewis physically abused me included hitting me with an open hand and a closed fist and kicking me.

12. During the 7 years I lived with the Lewises I saw my brothers, Edward Maxwell Lewis ("Max"), Matthew S. Lewis ("Matt"), Michael G. Lewis ("Mike"), and Theodore J. Lewis ("Ted") each physically abused many, many times by both Derwin and Rebecca Lewis.

13.I never told anyone about the abuse at the Lewis home because I was scared to tell. I had seen what happened to Nicole ("Nikki"). Nikki told someone at school that she had been hit at the Lewis home. Derwin and Rebecca took away all of her privileges and watched her all of the time. One time I had been hit by Rebecca so hard that I had welts on my back. I asked Matt if I should tell anyone. He told me not to, so I did not tell anyone.

14. In September 1997, I ran away from the Lewis home with my brothers Mike and Ted. It was not the first time I ran away from that home.

15. I finally ran away because I was sick of getting hit almost every day. My brothers and I made a plan, ran away and went to Darlene Lipponen's home. I never went back to the Lewis home.

Dated this 12 day of June, 2001.

"s/Orin P. Lewis".

Subscribed and sworn to before me
This 12th day of June, 2001.
"s/Lori Witalison".
Notary Public, State of Wisconsin
My commission: 8/19/01.

APP. 9

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EDWARD MAXWELL LEWIS,
MATTHEW S. LEWIS,
MICHAEL G. LEWIS,
T. L., *by his next friend, Edward Maxwell Lewis,*
and
O. L., *by his next friend, Edward Maxwell Lewis,*

Plaintiffs,Case No. 01 C 0056 S

v.

ELOISE S. ANDERSON,
SHIRLEY M. BOHLE,
SANDRA STOLLE,
APRIL LANCOUR, and
JANE DOE,

Defendants.

AFFIDAVIT OF MARY ANN KING

STATE OF WISCONSIN
COUNTY OF ONEIDA

Mary Ann King, being sworn on oath, states:

1. I am a licensed social worker with a strong background in direct practice and supervision. I received a Bachelor of Arts degree from Baylor University and a Master of Social Welfare from

Louisiana State University. I have had nearly forty years of experience in a wide range of social work practice settings and practice areas.

2. I have been employed since September, 1995, as Associate Director of Lakeland College-Chippewa Valley Center, Chippewa Falls, Wisconsin.

3. I was a supervisor at the Chippewa County Department of Social Services from July, 1980 until July, 1995. I have had substantial experience with the child welfare and foster care system, including the evaluation of foster care placements.

4. I have reviewed all of the documents produced by the plaintiffs and the defendants in this action. In addition, I have reviewed a copy of the transcript of the deposition of Sandra Stolle, which was taken on May 16, 2001. This information is the basis for the statements and conclusions I make in this affidavit. All statements and conclusions in this affidavit, I make to a reasonable degree of certainty as a social worker.

5. In my opinion, the defendants' decisions and actions in placing the plaintiffs in foster/adoptive placement in the Derwin and Rebecca Lewis home do not meet the standard of professional judgment which is minimally expected of a social worker. Specifically, I find the following acts or omissions fail to meet the professional judgment standard:

(a) The defendants failed to consider the recommendations of the therapists who evaluated and counseled the

plaintiffs prior to their placement in the Lewis home. I could not find in the documents any indication that the defendants considered the recommendations of Dr. Gina Koeppl and therapist Kathy Mitchell that the children not be placed together and that consideration be given to allowing them to stay in the foster homes in which they were, from all indications, thriving.

(b) The defendants failed to consider the overwhelming needs of the plaintiffs when they made the decision to place the children together in a home in which there were already five children, three of whom were also special needs children. The special needs of the plaintiffs were documented in the Intake Assessment and the Permanency Plan Review which was done in December, 1990, so it was clear that these needs were known to the defendants. For example, information was known to the defendants that Orin, the youngest child, showed no emotion or grief when he was removed from the foster home where he had spent three years. This is very alarming; it shows that the child is in need of specialized programming and therapy. The standard of professional judgment requires that a social worker treat children individually and consider the special needs of each child before making a placement decision. This means

determining what services, including therapy, had been provided to the children and contacting the therapists to determine whether therapy should be continued or whether there were other services which could be provided to help the child make the adjustment to a new home. When there is a termination of parental rights, county workers provide the guardian, usually the Department of Health and Family Services, with a copy of the county records. Defendants had the information necessary to know the risks to the children and to allow them to act to provide these children with the help and protection they needed.

(c) The second home study prepared by Sandra Stolle appears to be the product of a very hurried investigation and does not meet the standard for social worker investigations. The study is very general, uses the words of the adoptive parents instead of those of the social worker, and does not appear to be the product of the social worker's analysis. The information in that study makes it clear that Ms. Stolle did not meet alone with the Lewis children nor did she meet with the Lewis parents without the children present. She made no attempt to analyze the information they provided to her; she simply accepted it at face value. A social worker exercising professional judgment would realize that people present the facts most

favorable to them, and that it is extremely important to verify the information from collateral and independent sources.

(d) The information provided to me, which was available to Sandra Stolle, raises several areas of concern which should have been investigated and resolved before the family was approved for the placement of children. The following are some examples of information that should have been further investigated before children were placed in the Lewis home:

(1) Rebecca's family background should have been further investigated following Rebecca's report describing a dysfunctional childhood.

(2) Rebecca described herself as not being very patient. That self-report should have been considered carefully before adding six children to her family.

(3) Derwin and Rebecca appeared to be almost desperate for more children and were pushing for the placement of practically any child presented to

them. Their motivation for adopting should have been explored in much greater detail before more children were placed in their home.

(4) The family's financial situation should have been studied further to assess the financial stress that additional children would bring to the family.

(e) One of the three references named by Derwin and Rebecca had very disturbing things to say. If a social worker receives a negative reference such as the reference provided by John and Carrie Nelson, that worker must investigate further. The worker should have, at the very least, interviewed the Nelsons in person to determine the basis for the reference. For example, the reference raised concerns about Rebecca's irritability, possible prejudice toward the children and lack of stability in the home, all very serious matters. The concern is compounded because the references were chosen by Derwin and Rebecca so they presumably would be people Derwin and Rebecca would think would present positive information. By disregarding this information, defendants put the children placed into the

Lewis home at risk of being abused or neglected.

(f) There is no evidence that there was any transition of the children from their foster homes to the Lewis home. A transition should consist of short visits at first, then longer visits and finally, when there has been a long enough time to determine that the new placement will work, the child can move to the new home. In my opinion, a social worker has a duty to provide children with a transition before moving that child. For example, Orin's lack of attachment and grief could have been addressed before making a final decision on his placement. The only reason to move a child abruptly would be if that child were being abused in his or her current home; otherwise, the child wonders what is wrong with him or her. To the child, it is as if the previous foster family died. A social worker exercising good professional judgment would know the negative effect on children of such a move and the problems that move would cause for the new parents who have to manage the child's behavior. When there are six children placed in a home with untrained parents, about whom concerns have been raised by others, it is a recipe for disaster.

(g) There was no follow up on Derwin's report to Sandra Stolle that he had hit one of his children in the head with his fist. The decision to ignore such a report is

a serious violation of professional judgment. Upon receiving such a report, the social worker should first call the county agency, as, apparently, Ms. Stolle did. However, when the social worker is responsible for other children in the home, he or she cannot stop at that. The worker should immediately go out to the home and talk to the child who had been hit individually as well as the other children in the home to assess their safety. A worker receiving such a report must assume that there is danger in the home for the other children, and that worker should go to the home many times afterward to ensure the children's safety. A finding that abuse is not substantiated does not mean that the abuse did not happen (especially when the perpetrator of the abuse admits that it occurred); "unsubstantiated" only means that there was not enough evidence for the county to take action. A worker who is responsible for other children in the home cannot simply rely on such a finding, and, in my opinion, violates her professional responsibility by leaving the children in the home without investigating. In this case, it is possible that Derwin's report to Ms. Stolle was a request for help. By failing to respond and provide that help, Ms. Stolle may have passed up an opportunity to salvage the children's placement.

6. A supervisor, such as Shirley Bohle, who signs off on a home study or court report prepared

by one of the social workers she supervises, should have read the documents which were part of the investigation and information about the children and would know what the social worker knows about the family, the children and their situation. It is a violation of professional judgment for a social work supervisor to fail to act when he or she knows that children are at risk.

Dated: June 12, 2001.

"s/Mary Ann King".

Subscribed and sworn to before me
This 12 day of June, 2001.
"s/Georgia M. Doucetle".
Notary Public, State of Wisconsin
My commission: 10/07/2001.

APP. 10

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

EDWARD MAXWELL LEWIS,
MATTHEW S. LEWIS,
MICHAEL G. LEWIS,
T. L., *by his next friend, Edward Maxwell Lewis,*
and
O. L., *by his next friend, Edward Maxwell Lewis,*

Plaintiffs, Case No. 01 C 0056S

v.

ELOISE S. ANDERSON,
SHIRLEY M. BOHLE,
SANDRA STOLLE,
APRIL LANCOUR, and
JANE DOE,

Defendants.

AFFIDAVIT OF LYNN J. BODI

STATE OF WISCONSIN
COUNTY OF DANE

I, Lynn J. Bodi, being first duly sworn, say:

1. I am one of the attorneys for the plaintiffs in this action.

2. I make this affidavit on personal knowledge.

3. Attached as Exhibit A are true and accurate copies of pages 9-12; 21-28; 33-36; 41-64; 69-72; 89-96; 101-104; 113-140; 153-156, and 169-190; and exhibits 4 and 22 from the deposition of Sandra Stolle, dated May 16, 2001.

4. Attached as Exhibit B are true and accurate copies of pages 1-12 from the deposition of Shirley M. Bohle, dated May 16, 2001.

5. Attached as Exhibit C are true and accurate copies of exhibit numbers 5-9; 19-22; 27; and 40, proffered at the deposition of Sandra Stolle, dated May 16, 2001.

6. Attached as Exhibit D is a true and accurate copy of Plaintiffs' First Request for Production of Documents, dated March 22, 2001.

7. Attached as Exhibit E is a true and accurate copy of correspondence from Assistant Attorney General Mary Batt, dated April 26, 2001, which purport to be Defendants' Response to Plaintiffs' First Request for Production of Documents, with attachments of documents 3000; 3079-80; 3088-97; 3100-06; 3127-30; 3134, 3243-44; 3302-12; 3319-27; 3330-31.

8. Attached as Exhibit F is a true and accurate copy of Plaintiffs' Rule 26(a)(1) Disclosures, dated March 22, 2001, with attachments of documents 20-23 and 36-44.

9. Attached as Exhibit G is a true and accurate copy of Defendants' Rule 26(a)(1) Disclosures, dated March 20, 2001.

APP. 10

10. I make this affidavit in support of Plaintiffs' Motion for Summary Judgment.

"s/Lynn J. Bodi".

Signed and sworn to before me
this 15 day of June, 2001.
"s/Debra A. Morris".
Notary Public, State of Wisconsin.
My Commission: 08/17/03.

(6) A First I met with Rebecca and Derwin.
(7) Q And tell me the substance of your meeting with them, of
(8) your conversation with them.
(9) A Following my initial phone conversation with Derwin, I
(10) immediately asked Derwin to give me his interpretation
(11) of the incident.
(12) QAnd was that on the phone or when you were in the
(13) meeting?
(14)A Both.
....
(18)Q Go on. So when Derwin first called, you asked for his
(19) version of what happened?
(20)A Derwin didn't call me.
(21)Q Oh, who called you?
(22)A I called Derwin.
(23)Q Why?
(24)A About another matter.
(25)Q Okay. And how did this topic come up then?

(1) A He then brought it up.
....
(5) Q And did you ask him questions about what he had done?
(6) A Yes.
(7) Q What did you ask him and what did he tell you?
(8) A I asked him to describe the incident.
(9) Q What did he say?
(10)A He described the incident.
(11)Q And what did he say?
(12)A That there had been an argument and that Daniel had
(13) become out of control and Derwin attempted to bring him
(14) into control.
(15)Q In what way?
(16)A Physically.
(17)Q What did he do physically?
(18)A He attempted to restrain him and then was unsuccessful
(19) and then used his hand.
(20)Q To do what?
(21)A He hit Daniel.
(22)Q Then what happened?
(23)A Basically that's the end of his reporting of it.
(24)Q Okay. Subsequent to that you met with Rebecca and
(25) Derwin, right?

(1) A Correct.
(2) Q You were starting to tell me about that. What happened
(3) in that meeting?
(4) A They described the incident, or Derwin described the
(5) incident, with Rebecca present listening.
(6) Q Was Rebecca there during the incident, do you know?
(7) A No.
(8) Q And did he describe it any differently than the first
(9) time?
(10)A No.
(11)Q Was there any more to your conversation besides that?
(12)A Derwin reported to me that he felt that he had been too
(13) physical in restraining....
(15) Daniel is known to be an assaultive child with a
(16) history of severe biting of others and the school
(17) had had great difficulty. And Derwin felt he was pushed too
(18) far.
(19)Q Had he become angry?
(20)A Very, yes. Well, yes.
(21)Q How old was Daniel at the time?
(22)A I don't remember exactly.

(23)Q I'm going to show you Exhibit 1 which might help. Is
(24) Daniel the child identified on Exhibit 1 as D... J...?
(25)A Correct.

(1) Q Does that indicate his birth date as 9-03-75?
(2) A Correct.
(3) Q And is that accurate as best you can recall?
(4) A Yes.
(5) Q So this incident was ... in 1990, he would have been, it looks like, about 15, is that right?
(7) A Yes. Chronologically Daniel is retarded.
(8) Q Okay. Thank you for clarifying that. Tell me about
(9) Daniel's special needs. I mean, he is a special needs
(10) adopted child as well, right?
(11)A Yes, very.
(12)Q And what were his specific special needs?
(13)A Fetal alcohol, retardation.
(14)Q What level was he operating at in terms of his
(15) retardation?
(16)A Trainable, moderate.
(17)Q What grade in school was he, do you know?
(18)A No.
(19)Q What else did he have going on?
(20)A Mood swings, volatile behavior, assaultive behavior.
(21)Q Sounds like he was a very challenging child?
(22)A Yes, that could swing to be very lovable...

Report of Investigation

DCS-1804
Revised 2/82

Report of Investigation by WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF COMMUNITY SERVICES, under the provisions of Section 48.88(2)(b), of the Wisconsin Statutes.

ADOPTION OF: SCHLEY ORON LIPPONEN

PETITIONERS: DERWIN P. AND REBECCA E LEWIS

CHILD

First	Middle	Last Name	Birthdate	Birth Place
Schley	Oron	Lipponen	12/4/80	Marinette County, Wisconsin

Name to be changed to	Date Placed in	Placed By	Birth Status
	Adoptive Home		
Matthew Schley Lewis	7/11/90	DCS/NRO	In-Wedlock

Parental Rights Terminated:
On Mother: 5/31/90 By: The Honorable James P. Jansen,
On Father: 5/31/90 By: Forest County Circuit Court,

Health and General Comments:

Schley resided in a non-American Indian foster home with his brother, Edward, since their removal from their mother's care in July of 1987 until their placement in the Lewis adoptive home in July of 1990. When placed in the Lewis home, Schley had problems interacting with peers and was easily angered by what he perceived to be unfair behavior in others. Schley responds well to positive structuring and attention. He is affectionate and will readily accept hugs. He has done well working though the grief of losing his foster home and has made a satisfactory adjustment during the transition to his adoptive home.

Schley wants to be known as Matthew or Matt. He has been diagnosed hyperactive. He was on Ritalin when placed with the Lewises, but the family no longer sees a need for this medication due to his school success and appropriate interaction with the family. His fourth grade teacher writes glowing reports about what a delightful young man he is. Schley has difficulty going to bed alone and wants someone else playing with him all of the time. He has had several episodes of night screaming which he also had prior to placement. Schley is aggressive, not with other persons, but with

inanimate objects. The family is concerned over these things and may need to seek counseling for him in the future.

Schley is currently in good health. He is being monitored by his eye doctor for a "lazy eye".

The Lewises are very pleased about their upcoming adoption of Schley.

Report of Investigation

DCS-1804
Revised 2/82

Report of Investigation by WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF COMMUNITY SERVICES, under the provisions of Section 48.88(2)(b), of the Wisconsin Statutes.

ADOPTION OF:	MICHAEL JOHN LIPPONEN
PETITIONERS:	DERWIN P. AND REBECCA E LEWIS

CHILD

First Middle	Last Name	Birthdate	Birth Place
Michael John	Lipponen	1/30/83	Iron River, Michig

Name to be changed to	Date Placed in	Placed By	Birth Status
	Adoptive Home		
Michael Garner Lewis	6/4/90	BCYF	In-Wedlock

Parental Rights Terminated:

Report of Investigation
On Mother: 5/31/90 By: The Honorable James P. Jansen,
On Father: 5/31/90 By: Forest County Circuit Court,

Forest County, Wisconsin

Health and General Comments:

Michael resided in a non-American Indian foster home with his sister, Heather, since their removal from their mother's care in July of 1987 until their placement in the Lewis adoptive home in June of 1990. The initial foster parents had indicated an interest in keeping Michael in their home if adoption became a possibility, and not retaining Heather in their home. As the Shallows are not of Native American heritage, adoption was not a possibility for them.

Initially, the Lewises observed some level of hostility from Michael towards the other members of the household. He is no longer demonstrating these behaviors/attitudes and is very much looking forward to his adoption by the Lewis family.

Early in the school year, Michael came home saying, "second grade is too hard". Hayward's first and second grades teach reading phonetically. He was at a disadvantage as he had missed the first year of the program. He has now caught up and is doing well in school.

He remains to be shy at home and doesn't want to be noticed or have the limelight on him, he just wants to be a quiet member of the family. He likes "one on one" relationships rather than group interaction. The family is careful to allow him this individual attention and time alone as needed.

Michael is in excellent health.

Report of Investigation

DCS-1804
Revised 2/82

Report of Investigation by WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF COMMUNITY SERVICES, under the provisions of Section 48.88(2)(b), of the Wisconsin Statutes.

ADOPTION OF:	EADORE EDWARD LIPPONEN
PETITIONERS:	DERWIN P. AND REBECCA E LEWIS

CHILD

First	Middle	Last Name	Birthdate	Birth Place
Eadore	Edward	Lipponen	6/9/84	Manistique, Michig

Name to be changed to	Date Placed in	Placed By	Birth Status
	Adoptive Home		
Theodore Jorell Lewis	7/11/90	BCYF	In-Wedlock

Parental Rights Terminated:
On Mother: 5/31/90 By: The Honorable James P. Jansen,
On Father: 5/31/90 By: Forest County Circuit Court,

Health and General Comments:

Eadore resided in a non-American Indian foster home with his brother, Oron, since their removal from their mother's care in July of 1987 until their placement in the Lewis adoptive home in July of 1990.

In the initial foster home, Eadore's receptive and expressive language skills were found to be delayed and this delay continues to be significant to date. Eadore was enrolled in the Early Childhood Program four afternoons a week during the 1989-90 school year. He received speech and language therapy as part of a small group on a daily basis. The recommendation for Eadore has been to begin kindergarten but with continued enrollment in the Early Childhood Program as well. His skills are thought be approximately one year delayed.

Eadore has chosen to be called Theodore or Ted and loves it when his kindergarten teacher calls him "Teddy". He is lacking the basic academic skills (A-B-C's and numbers) that his fellow classmates possess and he may need to repeat this grade next year. Eddie Lewis is his "best buddy" and simple "play" entertains them both for hours. He attends school every other day and enjoys being home with Derwin the other

days. His genuine ability to have fun in non-demanding ways is charming. He is a loving and delightful child to be around.

The Lewis family is looking forward to Eadore's upcoming adoption.

Eadore is in excellent health.

Report of Investigation

DCS-1804
Revised 2/82

Report of Investigation by WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF COMMUNITY SERVICES, under the provisions of Section 48.88(2)(b), of the Wisconsin Statutes.

ADOPTION OF: ORON LEROY LIPPONEN

PETITIONERS: DERWIN P. AND REBECCA E LEWIS

CHILD

First Middle	Last Name	Birthdate	Birth Place
Oron Leroy	Lipponen	7/1/85	Manistique, Michig

Name to be changed to	Date	Placed in	Placed By
		Adoptive Home	
Orin Porter Lewis	7/11/90		
DHSS/DCS			
			BCYF In-Wedlock

Parental Rights Terminated:
On Mother: 5/31/90 By: The Honorable James P. Jansen,

Report of Investigation
On Father: 5/31/90 By:

Forest County Circuit Court,
Forest County, Wisconsin

Health and General Comments:

Oron resided in a non-American Indian foster home with his brother, Eadore, since their removal from their mother's care in July of 1987 until their placement in the Lewis adoptive home in July of 1990.

Oron displayed little emotion regarding his move from the initial foster home even though he had resided there for three years. No particular problems have been noted in his ability to bond with the Lewises, and he does appear to be bonding, but he will likely require continued monitoring regarding his lack of grief during the transition to the adoptive home and his adjustment in general.

Oron is in LCO Head Start every morning, Monday through Friday. He is doing well academically and socially in school. When placed in the Lewis home he was whining a great deal, wasn't able to share, using "baby talk" much of the time, pouting and having tantrums. These negative behaviors have diminished tremendously. He wants and gives frequent and genuine hugs and kisses and has shown a great deal of personal sense of security since

placement. He is now genuinely remorseful when he hurts others as opposed to his previous pouting and isolating himself when reprimanded.

The Lewis family, as well as Oron, are pleased to have him become a permanent member of their family.

Oron is in excellent health.

Report of Investigation

DCS-1804
Revised 2/82

Report of Investigation by WISCONSIN DEPARTMENT OF HEALTH AND SOCIAL SERVICES, DIVISION OF COMMUNITY SERVICES, under the provisions of Section 48.88(2)(b), of the Wisconsin Statutes.

ADOPTION OF:	EDWARD A. LIPPONEN II
PETITIONERS:	DERWIN P. AND REBECCA E LEWIS

CHILD

First Middle	Last Name	Birthdate	Birth Place
Edward A.	Lewis	7/27/79	Marinette County, Wisconsin

Name to be changed to	Date Placed in	Placed By	Birth Status
		Adoptive Home	
Edward Maxwell Lewis	7/11/90	DHSS/DCS BCYF	In-Wedlock

Parental Rights Terminated:
On Mother: 5/31/90 By: The Honorable James P. Jansen,
On Father: 5/31/90 By:

Health and General Comments:

Edward resided in a non-American Indian foster home with his brother, Schley, since their removal from their mother's care in July of 1987 until their placement in the Lewis adoptive home in July of 1990.

Prior to being placed in the Lewis home, Ed was described as a parentified child and although his caring concern for his siblings was often perceived as good, Ed needed permission and reminders to be a child. Ed is very meticulous about his belongings. He had some concerns about his belongings being used without his permission once he was reunited with his siblings. Ed does not appear to be as spontaneous and playful as one would expect from a child his age and this may be in part due to his role of being a caretaker in his birth family.

Ed's academic start was rather slow and he was required to repeat kindergarten due to numerous absences. He has been stubborn about working in school and manipulative regarding academic demands. The family is seeing improvement in this area. His most recent parent-teacher conference eon 11/8/90 was very positive. His grades have improved

greatly and he is a "B – C" student (previously he was a "C – D" student).

Ed has been slow to become close with the Lewises but has made great strides in this area since contact with his former foster mother has been discouraged. This was discouraged due to her over-possessiveness and inability to allow the children to become free to bond with their permanent family. Ed is becoming an affectionate member of the Lewis family and they are very much looking forward to him becoming a permanent member of their family. They describe him as a sensitive and caring child.

Edward is in good health.

NATURAL MOTHER

First	Middle	Last Name	Maiden Name	Marital Status
Darlene		Lipponen	Livermore	Divorced

Birthdate	Birth Place	Education	Race
11/1/51	Munising, Michigan	12 years	White

Health and General Comments:

County and tribal social service records refer to Darlene as a person who appeared concerned about the welfare of her children, but for multiple reasons, was unable to adequately provide for their care with or without supportive services. Records indicate a history of mental problems and inpatient hospitalizations including a suicide attempt in 1983. Darlene is reported to have used alcohol extensively and to have been physically and emotionally abusive to her former husband.

NATURAL FATHER

First	Middle	Last Name	Birth Date
Edward	Arthur	Lipponen	5/5/48

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PATERNITY ESTABLISHED Education Race Occupation

/x/ Yes /__/ No Unknown American Not Indian Employed

Health and General Comments:

Edward is a member of the Sokaogan Chippewa Tribe at Mole Lake, as are all the children. Iron County, Schoolcraft County and Marquette County in Michigan each worked with the family to remedy the neglectful family conditions, since shortly after the oldest child's birth. Mr. and Mrs. Lipponen then brought their children to the reservation at Mole Lake. The Tribe and Forest County Department of Social Services worked to provide the family with services to prevent out-of-home placements for the children. The precipitating conditions requiring out of home placement were described in the records as extremely neglectful conditions, such as very filthy living conditions, inadequate clothing, lack of provision for physical and medical needs of the children, and lack of emotional nurturing.

Edward is reported to be recovering from his chemical dependency and has requested visitation once each season with his children and the Lewis family has agreed to this. Ed requires assistance with the general management of his life and resides near his

sister in Marinette who provides him with this assistance. Ed is rather quiet and presents a pleasant manner, although he also has little capacity to understand his role in the neglect of the children. Ed voluntarily terminated his parental rights, readily admitted he could not care for them and was pleased the children would be re-united in an Indian home.

PETITIONING MOTHER

First	Middle	Last Name	
	Maiden Name		
Rebecca	Elizabeth	Lewis	Delapast

Birthdate	Birth Place	Race	Education	Occupation
1/29/55	Hayward, WI	American Indian	12 years	Tribal Council Chairperson

Employed By	Since
Lac Courte Oreilles Band of Lake Superior Chippewa Indians	6/14/89

Health and General Comments:
Rebecca is an enrolle member of the LCO Band of Lake Superior Indians. She is in excellent health. Rebecca is a firm, yet consistent parent with all of the children. She is an extremely loving parent, who treats each child individually with respect and understanding. She feels the transition period has run much more smoothly than she had every expected, not only considering the move to a new family for the six children, but the reunification of the six siblings with each other. Primarily, Rebecca's life revolves around her family which is her mission

by choice. She is full time employed but maintains a close co-parenting with Derwin, who provides the full time daily care of the children.

Rebecca's quiet sense of humor and easy-going nature have been tremendous assets in her parenting of this large number of children. Rebecca is firm in her disciplining of each of the children. She is thrilled with the upcoming adoption of her new children.

PETITIONING FATHER

First	Middle	Last Name
Derwin	Phyl	Lewis

Birthdate	Birth Place	Race	Education	Occupation
12/1/50	Ogden, Utah	White	11 years	Full-time home parent/summers-beekeeping

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Employed By
Since
Self

Health and General Comments:
Derwin is in excellent health. He is a father that shares equal parenting and responsibilities and interests with his wife, Rebecca. Derwin equally enjoys his children as does Rebecca. Derwin shows no difference in treatment or care of any

of his children. Derwin also agrees that the placement of the six children in the home has been much easier than he had expected. The respect Derwin gives each of his children is reflected in the respect they return not only to the parents, but to each other as siblings. Derwin is easy-going yet firm in his parenting skills which are reflected when one visits the home.

Derwin provides the care of the children and the home during the days. He was reared in a large and happy family and this background has served him well in the parenting of his children. He is elated about the upcoming adoptions.

MARRIAGE

Date	Place	Previous Marriage
11/23/73	Ogden, Utah	/x/ None See Comment /__/

General Comments:

The 17 year marriage of Derwin and Rebecca Lewis is extremely strong. They share an equal desire to parent their children and it is apparent that they see rearing their children as an enjoyable project. Disagreements among Derwin and Rebecca are very infrequent and they jointly discuss and share in decision making in the home. Derwin and Rebecca are a very comfortable couple to be with and parenting is the central theme in their lives. Derwin and Rebecca feel that children should have fun growing up and that belief is apparent in visiting with the children, Derwin and Rebecca in their home. Special outings are planned on a regular basis with all of the children, Mom and Dad, particularly since they have recently acquired a van. This is a non-smoking family as well as one who does not use alcohol.

OTHER CHILDREN

Name, Age, Comments:

Daniel Benjamin Lewis, male, DOB 7/3/75; Leland Cole Lewis, male, DOB 6/25/77; Paul Samuel Lewis, male, DOB 12/16/78; Nicole Yuri Lewis, female, DOB 7/7/81; and Edward Mansel Lewis, male, DOB 6/1/82.

Prior to placement of the six Lipponen children, I met both individually and as a group with the Lewis children. They were very much a part of the decision making process in the acceptance and placement of the new children. They continue to be supportive of the placement and are looking forward to the Lipponen children becoming their permanent brothers and sister.

RELIGION

Natural Parents Petitioning Mother Petitioning Father Will Be Reared
Catholic Latter Day Saints Latter Day Saints Latter Day Sa

General Comments: (with freedom of choice for add Indian religious education)
The entire Lewis family, including all 11 children, are currently active in their local church and the activities surrounding the church. Each of the children appears to be

enjoying the socialization of the church. All five children are also active in traditional Indian ceremonies in the LCO area.

HOME

Address of Petitioners	Type of Home
Value of Home	
Route 5, Box 5352-L	Six Bedroom Frame
$78,000	
Hayward, WI 54843	

General Comments:

The Lewis home is extremely comfortably and attractively decorated. Their six bedroom home is placed on a spacious lot approximately 12 miles from downtown Hayward, Wisconsin. Each of the children's bedrooms reflect individual interests and memorabilia is displayed on walls and shelves. The Lewis home meets all new safety standards and specifications. The nicely wooded lot also allows for a generous area for play.

FINANCES

Petitioners
Annual Income
$26,500

Life Insurance
Metropolitan Mutual/Derwin (Face Value of $5,000)

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Health Insurance
Indian Health

Homeowners Insurance
Aetna

Comments:

Derwin and Rebecca appear to be living well within their means and as these are subsidized adoptions, it is felt that Derwin and Rebecca will well be able to financially parent all ~~five~~–six children.

REFERENCES

All references were extremely positive regarding Derwin and Rebecca and their parenting skills. The references highly recommended Derwin and Rebecca as adoptive parents and feel that they are doing an excellent job with their children. The references also noted that Derwin and Rebecca have a strong marriage and that they work together extremely well.

Prior to placement of the Lipponen children with Mr. and Mrs. Lewis, the Sokaogan Chippewa Tribe at Mole Lake gave their approval for this placement. Their Indian Child Welfare Worker, Ms. Nancy Kane, assisted I the placement process of the children and has visited the Lewis home.

FAMILY FUNCTIONING/RECOMMENDATION

Because Derwin and Rebecca Lewis have proven themselves to be such good parents to all of their children, we believe it is in the children's best interests to be adopted by them.

The information in this report having been verified, it is the belief of the State Department

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of Health and Social Services that this adoption is in the best interest of the child and it is, accordingly, recommended.

Sandra Stolle Social Worker	Shirley M. Bohle Date Supervisor Adoption & Permanent Planning

BUREAU OF CHILDREN, YOUTH & FAMILIES
WISCONSIN DEPARTMENT OF HEALTH &
SOCIAL SERVICES